Transactional
Drafting
Introduction to Contract Drafting &
Transactional Practice
Ben L. Fernandez

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I dedicate this book to my former colleagues, Professors Leslie K. Knight, Deborah Cupples and Margaret Temple-Smith.

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PREFACE

Every law school in the country requires its students to take a first semester first year course that teaches them how to write a research memorandum and introduces them to the type of work that is done by a young associate at a law firm. And all of those law schools also require their students to take a second semester first year course that teaches them how to write a memorandum in support of a motion presented to a trial court (or an appeal brief) and introduces them to litigation practice (or appellate practice). About half of the lawyers in the U.S. are litigators. The other half are transactional attorneys. Yet there are only a handful of law schools that require their students to take a third course that teaches them how to draft a contract and introduces them to transactional practice. That is the subject of this book.

One way to describe what contract drafting and transactional practice entails is to compare it to what is involved in the other types of writing lawyers do. For example, when a young lawyer is assigned to write a research memo or a trial memo (or appeal brief), they usually start by obtaining the facts from an older associate or a partner in the firm, or a document filed in the litigation. The facts describe an event or a series of events that happened in the past. The lawyer's primary concern in describing the facts in a research memo is to make sure the description is accurate and complete. If the lawyer is writing an appeal brief, their primary concern is to ensure the description of the facts is also persuasive.

When a lawyer writes a research memo or a trial memo (or appeal brief), the core of the document is the attorney's analysis of some legal issue. In the document, the attorney states the facts, applies the law (statutes and cases) to the facts, and comes to a conclusion. The facts are important but the

analysis is what the attorney devotes their primary attention to.

In addition, legal memos, trial memos and appeal briefs are usually written from scratch (i.e., starting with a blank page). And legal writing is usually done by one lawyer working alone. For example, in litigation, the lawyer representing one party writes a memo for their client, and the lawyer for the other party writes a separate memo for their client.

When a transactional attorney drafts a contract the situation is entirely different. They usually obtain the facts (the terms of the deal) directly from the client. Some of those facts may involve past events, but most of them describe things that will happen in the future. Part of the attorney's job is to translate that information into the language and organization customarily used for legal agreements. But the attorney also contributes to the substance by brainstorming for mechanisms to effectuate the client's intent and provisions to protect the client in the event various contingencies occur.

When a lawyer drafts a contract, the core of the contract is the description of facts (the deal terms). There are circumstances where the attorney is also called upon to apply the law to certain contract provisions. Deciding what words to use, like whether to use "shall" or "will" or "must' for an obligation, is also part of the drafting process, but it is not the primary thing an attorney is concerned with when they draft a contract for a client.

In addition, contracts are not typically drafted from scratch. The lawyer usually starts with a precedent or sample document. And contracts are not typically drafted by one person alone. Both lawyers, each representing their own client, usually collaborate in drafting a contract with terms both sides are agreeable to. So the process of drafting a contract is very different than the process of writing a research memo, trial memo or appeal brief.

In one respect, however, legal writing and contract drafting are similar. Both topics involve more than just writing well. Before a law student learns to write a research memo they learn about the sources of law in the American legal system, and they learn how to research issues within those sources. Legal research is an ancillary skill that is usually taught in connection with a first semester legal writing class.

After a litigator learns to write a trial memo or an appeal brief, they also learn how to represent a client in oral argument. A significant portion of a second semester class on persuasive writing is usually devoted to arguing a trial memo or an appeal brief at a hearing before the applicable court. Oral argument is another example of an ancillary skill taught in a writing class.

Contract drafting is similar. After a contract is drafted it is usually also necessary to get deal closed: oversee the signing of the documents, arrange for the perfection of any security interests and handle the disbursement of any proceeds of the transaction. Conducting a closing is an example of an ancillary skill involved in contract drafting.

As any text on legal writing, the coverage of this book on contract drafting goes beyond writing well. In the same way that a first semester legal writing class prepares students to work as an associate in a law firm and a second semester class gives them the skills they need to practice litigation, this book includes everything students need to know to "hit the ground running" as a transactional attorney.

INTRODUCTION

This book will teach you how to draft a contract from scratch and how to draft a contract using precedents. It will also introduce you to each of the other skills required for transactional practice. The book starts with a chapter on getting up to speed and properly conducting a client intake because the information obtained in that initial client meeting is what determines the substance of the agreement. And the substance of the agreement is the most important thing to get right.

The following chapters explain how to consistently draft obligations, rights, prohibitions and descriptive statements that are clear and unambiguous. Also, the organization of the various sections of an agreement is discussed, with plenty of examples of the two most basic types of agreements (a purchase agreement that involves a due diligence period and a closing, and a rental agreement that has a term and periodic payments over time).

The book covers "brainstorming." By thinking about things could go wrong, and making sure the client is protected should the those things occur, lawyers generate the additional substance they are expected to contribute to an agreement.

The next chapters explain how to draft with precedent documents (forms and samples) because in practice lawyers spend most of their time working with precedents. There is no need for an attorney in practice to draft a promissory note or a mortgage from scratch every time they are asked to handle a commercial loan. Rather, the job of a transactional lawyer is usually to tailor a set of existing forms to the terms of each deal; and there is more to that process than just filling in the

blanks in an existing document.

The process of drafting a contract also doesn't end when the document is completed. Contract language is almost always negotiated in commercial deals. When the negotiations are completed, counsel is usually required to get the documents signed. Sometimes that involves conducting a formal closing, other times the lawyer need only confirm the authority of the signer to sign for an entity. Often ethical issues arise in connection with that process that need to analyzed and resolved. And sometimes computers are used to draft the documents and record the signatures of the parties. Each of those topics is also discussed in the final chapters of the book.

As you read each chapter develop a checklist of your own that you can refer to when you draft contracts from scratch, revise complex forms or do any of the other things taught in this book. Drafting a contract is not like writing a memorandum. The conventions for drafting contracts are far more in number. You don't have to memorize them all but you do need to keep track of them, and keep what you learn in a form you can refer back to when you draft.

You also need to collect samples of the contract provisions you study in this book and the sample documents provided here. You learned in a class on legal writing how different drafting a legal memorandum is than writing an essay. The process of writing enforceable obligations is even more different than the type of writing you learned in your first year of law school. Again, you don't have to memorize what you learn here, but you should keep copies of well drafted provisions and documents you encounter. That is what transactional lawyers do in practice. You should start getting in the habit of doing that now.

More than anything else, however, you need to practice. A course on contract drafting is not a substantive course; a contract drafting course is a skills course. And you learn a legal skill the same way you learn any other skill: by practicing. You need an introduction to the relevant conventions, and you need to see examples of how those conventions are applied in varying contexts. But ultimately you learn to draft contracts by drafting contracts.

Develop a checklist, collect samples of contract provisions, and practice as much as you can. Do all that you will be ready for transactional practice by the end of this book.

1. PREPARING TO DRAFT

The first step in contract drafting is getting up to speed. Before you meet with the client to find out what the agreement is, you must prepare. And that means becoming familiar with the client's business and the nature of the goods or services involved, doing a little research to find out what the applicable law is, taking a look at some sample agreements to see what the issues are and what information you will need, and then conferencing with the client and flushing out the terms of the deal.

A. Find Out What Type of Agreement You Will be Drafting

If a client tells you he wants to hire you to draft an agreement,

or a senior partner tells you they have a client who wants the firm to draft an agreement, the first thing you need to do is find out what type of agreement you will be drafting. Don't just put the time and date of that initial meeting in your calendar and then show up unprepared. You need to get up to speed before you do anything and, to do that, you need to know what type of agreement you will be drafting. Is the client a bank that wants to retain the firm to close a commercial loan? Or is the client a wealthy young person who wants you to draft an antenuptial agreement before their upcoming marriage. You can't prepare if you have no idea what type of contract you will be drafting, so step one is to find out as much as you can before that initial client meeting takes place. Don't try to conduct a client intake for a business agreement on the fly. You need to set up a meeting, in person, over the phone or online, and then you need to use the time before the meeting to get ready.

B. Learn About the Client's Business and the Goods or Services Involved

Suppose the client is hiring you to draft an agreement to construct a building. Do you know anything about the construction business? Probably not. Why would you? You're a lawyer not a general contractor. But if you have a contractor for a client, you need to develop some familiarity with the construction business before you represent them. You need to have some idea what is involved in constructing a building before you can draft a construction agreement.

Usually there is a set of "plans and specifications" that describe the structure. The plans, which are actually called "drawings," show the dimensions and location of each room; the specifications detail the materials to be used and the identity of things like appliances and furnishings. Then there is a budget itemizing how much everything will cost, and

a schedule for when things will be done. Construction is not done by one person or entity; there is usually a "general contractor" who works with various "subcontractors" to get the work done. The people who pour the foundation are different than the people who do the framing. The electricians do the wiring and the plumbers do the piping. HVAC (heating, ventilation, and air conditioning) is handled by one group, and drywall is handled by another. And the coordination and payment of all these parties is critical to the timely completion of the project.

If there are changes (and there usually are), there is a "change order" procedure that has to be gone through. If subcontractors don't get paid, there are "material men's liens" that have to be dealt with. And that process is usually governed by a state statute. If there is financing, the lender will constantly be verifying that the loan is "in balance" (i.e., there is enough money left to complete the project). If there is insurance, the insurer will also want to monitor construction progress, so that the amount of coverage can be adjusted as the building is constructed. At a minimum, you have to be familiar with all of these things before you meet with the client to learn the deal. If you don't do that preparation,

communication with the client may be hampered. You may not be able to draft the contract well, and you may also cause the client to lose confidence in you. For a lawyer, that is the beginning of the end. You can't risk letting that happen.

Learn as much as you can about the client and the client's business before you meet. If you are not familiar with the product or service that will be involved in the agreement, take the time to get up to speed. Learn the lingo so you can understand what the client is telling you. The client will be expecting you to have that familiarity. If you can at least give the impression that you know what you are doing, the client will have confidence in you, and the process will be facilitated.

C. Do Some Research and Make Sure You are Familiar with the Applicable Law

Depending on the type of transaction you are working on there are a variety of different laws that may apply. It would be impossible to list them all. What you have to do is think about the type of transaction, the subject matter involved, and the business the parties are in; and then do some research to see what law applies. The client will expect you to be familiar with the law. If you aren't, you risk starting the relationship on the wrong foot.

For example, if you are planning to draft a contract for the sale of goods, you need to take a look at Article 2 of the Uniform Commercial Code. Do that and you will see the requirements for excluding implied warranties in § 2-316, limiting consequential damages in § 2-719, providing for liquidated damages in § 2-718, and shortening the statute of limitations in a sales agreement, § 2-725. Those are all things you may want to add to an agreement if you are drafting it on behalf of a seller. If you do want to add one or more of

those provisions, you will have to check the statute to see what requirements there are for how the provision must be drafted.

If what your client is buying or selling is real estate, there are likely state laws applicable to the transaction. For example, Florida sellers of real estate are required to disclose the potential effect of the sale on ad valorem taxes, § 689.261, Fla. Stat., the dangers associated with radon gas, § 404.056(5), Fla. Stat., the potential for erosion of coastal properties, § 161.57, Fla. Stat., and information about homeowner's associations and condo associations, §§ 720.401 & 718.503, Fla. Stat. If you are drafting a purchase and sale agreement on behalf of a seller, you may want to include those disclosures in the agreement, so it is clear the applicable laws have been complied with.

Article 2A of the Uniform Commercial Code applies to the lease of goods. The statute contains many of the same provisions that are included in Article 2, plus some additional sections only applicable to leases. For example, limitations on choice of law and choice of forum provisions are contained in § 2A-106. Choice of law and choice of forum provisions are typically included in a commercial lease, so you will need to know what those limitations are.

If the lease applies to residential real estate, then, again, there are likely a series of state statutes that will apply to the agreement. For example, Florida law requires a variety of disclosures be made and procedures be followed whenever money is deposited or advanced by a tenant in connection with a rental agreement, § 83.49, Fla. Stat. If the lease you are drafting includes a security deposit, it would "behoove" you (as my old boss used to say), to make sure whatever provisions you are including comply with the statute.

Mortgages conveying a security interest in real property are also governed by state statutes. In some states, mortgages actually convey title to the lender ("title theory" states); in other states mortgages convey a security interest ("lien theory" states). I think every state requires a mortgage to be recorded to have priority over other subsequent creditors, but the place of recording differs from state to state. Also, in some state non-judicial foreclosures can be conducted under a "power of sale;" in other states, judicial approval of the foreclosure process is required. So, before you start drafting (or looking for sample documents you might use), you will need to know what the applicable law is.

State laws also regulate various types of consumer transactions and service providers. For example, in Florida, there is a state statute regulating the form and substance of membership campground agreements. §§ 509.501-509.512, Fla. Stat. And there is another statute governing talent agencies and the contracts they enter into. §§ 468.401-468.415, Fla. Stat. If you draft a membership campground agreement or a talent agency contract in Florida without first researching the applicable statute, you risk producing a document that violates state law.

Those are just a few examples. After you have familiarized yourself with the client and the client's business, do some research to familiarize yourself with the applicable law. You need that information to understand the client's concerns and fulfill your role as counselor and draftsperson.

D. Review Sample Documents and Create a List of Questions

The next step is to take a look at some sample documents. One way to do that is to do an internet search for the type of agreement you are interested in. The problem is, if

you do it that way, you are likely to find links to websites selling agreement forms to consumers, like Rocket Lawyer and Legal Zoom. But you don't want those types of documents. You want to look at sample commercial agreements used by lawyers. So you need to go to a law library (assuming libraries still exist after you graduate and start practicing) or go to a website for attorneys. Westlaw has a service called “Practical Law” that is a good source for sample agreements. The Securities and Exchange Commission service called EDGAR (Electronic Data Gathering, Analysis, and Retrieval) is free a source that can be used to search for sample business documents. Also, there are free websites like onecle.com and lawinsider.com that are additional sources for sample agreements and contract provisions.

Note however the purpose of gathering sample documents at this stage is not to find a form you can use. Rather it is to find out what issues are typically dealt with in the type of agreement you will be drafting and what pieces of information will be needed to complete the document. For example, if you are drafting a commercial lease and you look at a typical form, you will see that you will need the name and addresses of the parties, the amount and payment terms for the rent, a detailed description of the premises, and the amount and terms for any advance rent or security deposits. Knowing that you can begin to make a list of questions you will need to ask the client. And making that list will ensure the initial client meeting is efficient and productive.

So, in addition to learning the clients business and becoming familiar with the applicable law, also take the time to search for some sample documents and develop a list of questions and issues for your meeting with the client.

E. Meet with the Client and Flush out the Terms of the Deal

The last step is to meet with the client and find out the terms of the agreement. And the first thing to know about that step is that most people don't like meeting with lawyers. I know it's hard to imagine, but for the average person, going to see a lawyer is like going to the dentist. You know you have to do it, but you don't want to, and you hope to get it over with as soon as possible. For lawyers that means it isn't always easy to get the client to sit down and go through all the facts of the deal with you. So, make the process as painless as possible. Explain why you need to go through this process and then do it efficiently. Have a list of questions or an outline ready. Ask open-ended questions, like you would in a deposition (i.e., questions that begin with who, what, where, when, why, and how). Listen carefully and take good notes.

If you are a litigator meeting with a client for the first time, you want to ask open-ended questions, listen carefully to the answers, and learn as much as you can about what happened. But you also want the client to know you empathize with their position. That is critical to establish in the first client meeting. Similarly, if you are a transactional attorney doing an initial client intake, you ask open ended questions, listen carefully to the answers and learn as much as you can about the transaction you will be documenting. But you also want to demonstrate to the client that you fully understand the terms of the deal. That is what is critical to establish when you are hired to draft a contract.

What you want is to get to the point where you know everything the client knows. Who agreed to what? What did the other guy agree to in exchange? What else was agreed upon? What representations were made? You may be surprised to find there are a lot of things that weren't discussed but should have been. Keep track of what those things were. And keep asking questions until you have completely flushed

out all the elements of the deal, and all the details of each element.

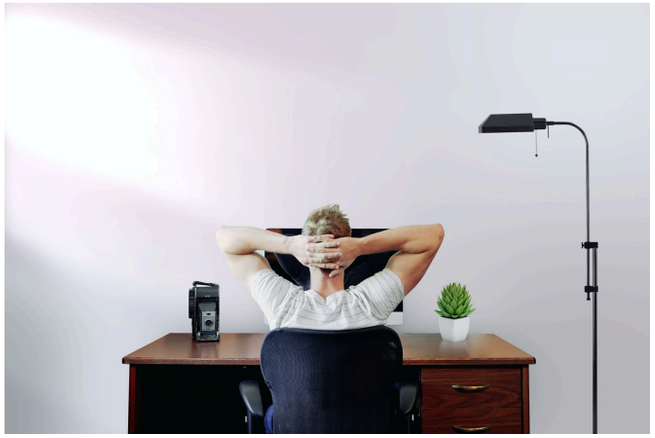
There will come a time when you actually know the deal better than the client. But for now, just make sure you know everything the client knows. All the information in the client's head has to be transferred to your head for you to transcribe that information in a contract. Plus you need to understand the client's interests and concerns. You need to understand what is important to them and what they are looking for your to contribute. Also, try to establish a rapport with the client; and leave the door open when you are done.

F. Contribute to the Substance of the Agreement

There is more to drafting contracts than transcribing what the client tells you and writing it in a clear and organized way. Part of the lawyer's job is to document whatever the client says the deal is. But part of the lawyer's job is also to think into the future about all the different things that could happen after the agreement is signed; and make sure the client's interests are protected should any of those contingencies occur. I call that "brainstorming." The client tells you what the agreement is, and then you try to think of what additional issues should be addressed, and what provisions you might add to better protect the client or advance the client's interests. Also, you sometimes need to do a little research to make sure whatever you add will be enforced by a court.

Suppose the seller agrees to sell a commercial building to the buyer and hires you to draft a purchase and sale agreement. Likely the parties talked about the features of the building, the price and what would have to happen for the closing to occur. They may have even put together a timeline and scheduled a date for completion. But they probably did not talk about what

would happen if the building burned to the ground before the closing took place. That's the type of thing the lawyer needs to think about and address in the agreement in addition to everything else.



As another example, suppose two partners agree to start a law firm together and hire you to draft a partnership agreement. They probably talked about what their practice would consist of, where their office would be, and how they would share profits and divide expenses. But they probably didn't discuss what would happen if at some time in the future one of them died or decided to leave the partnership. Again, that is an issue the lawyer will have to raise, resolve between the parties, and then make part of the agreement. Once you know the terms of the deal, brainstorm for issues that were left out and contingencies that may happen in the future. Then follow up with the client, resolve the issues and add the additional language to the agreement.

Those are the five steps to getting up to speed. Make yourself familiar with the goods or services involved. Make sure you are on top of the applicable law. Review some sample agreements

and make an outline of questions to ask. Meet with the client to flush out the terms of the deal. And brainstorm for contingencies the client may not have considered. Once you have done those five things, you should have everything you need to start drafting.

Client Intake Checklist

- [ ] Find Out What Type of Agreement You Will be Drafting
- [ ] Learn About the Client's Business and the Goods or Services Involved
- [ ] Do Some Research Make Sure You are Familiar with the Applicable Law
- [ ] Review Sample Documents and Create a List of Questions
- [ ] Meet with the Client and Flush out the Terms of the Deal

Practice Exercises

1. A client is retaining us to draft a purchase agreement for beer brewing equipment. When I talked to her on the phone she said the agreement should be contingent on the inspection of the "mash tun" and the "hot liquor tank." Also, the seller has a "CIP" system and should be required to use it to clean out the "wort" before the inspection happens. I am not familiar with that terminology. Please do some quick research online and send me an e-mail memo explaining what she meant so I can prepare for the initial client conference.

2. A firm client has hired us to draft a promissory note for a finance transaction. When I talked to him on the phone he said this would be a little different than a conventional lending arrangement. The loan would have a 20 year term but a 30 year "amortization." The lender isn't worried about

the structure because rates are going down and there should be no problem doing a "refi" when the "balloon" is due. I am not familiar with these terms. Please do some quick research online and send me an e-mail memo explaining what he meant so I can get up to speed before I discuss the details of the loan with the client.

3. A client contacts you to draft a commercial lease for office space. She says the lease should be "triple net." The rent is $1,500 per month plus "CAM" charges. The landlord will provide everything up to the "rough plumbing" and the tenant will do responsible for any build out from there. Likely you are familiar with a lease agreement, having signed one for the apartment you live in now. If you are not familiar with this terminology, please do some quick research online and send me an e-mail memo explaining what she meant so you will be prepared for an initial meeting with the client to discuss deal terms.

4. Your next project will be to draft a residential lease for property in the state you live in. To prepare, you need to do some legal research on the statutory requirements for a residential lease. The landlord will be collecting the last month's rent, as well as a security deposit, as part of the deal. Are there any disclosures or notices that have to be included in the agreement? Are there any restrictions on provisions that may or may not be included?

5. You need to prepare for a client conference for a real estate purchase. Go online and collect some real estate purchase and sale agreements. Make sure the samples were drafted for a small real estate transaction in the state in which you live. Also, try to find forms drafted for a seller, not a buyer. Then read through the forms to find out the information you will need to produce a final draft; and outline that information to create a list of questions for a client conference.

2. DRAFTING OBLIGATIONS, RIGHTS, PROHIBITIONS AND DESCRIPTIVE STATEMENTS

Contracts typically contain four types of provisions: obligations, rights, prohibitions, and descriptive statements. And any of those types of provisions can be subject to a condition. To draft contract provisions clearly you have to first be able to determine what type of provision is involved. You have to take what the client tells you and figure out if what they are describing is an obligation, prohibition, right or descriptive statement.

A. What are Obligations, Rights, Prohibitions and Descriptive Statements?

Obligations are provisions that require a party to do something in the future they are not already required to do. If the client tells you they have a buyer who has agreed to buy property they are selling, and the client wants you to memorialize that agreement in a written contract, the provision you need to draft is an example of an obligation. The buyer will not be legally obligated to follow through with the purchase until you create that obligation in the contract, and the buyer agrees to it by signing on the bottom line.

Rights are provisions that enable a party to do something in the future they don't already have the ability to do. If the client also tells you they have agreed that the buyer can inspect the property before the sale, the provision you need to draft is an example of a right. A buyer doesn't normally have the ability to inspect something they don't own. To enable them to do that you need to draft a contract provision giving them the legal right to do the inspection.

Prohibitions prohibit a party from doing something they would otherwise be able to do. The client may have further agreed not to market the property once the agreement is signed. That is an example of a prohibition. A seller normally has the ability to market property they are offering for sale. To prevent a seller from doing that, you need to draft a prohibition.

Obligations, rights and prohibitions concern things that happen in the future. By drafting those provisions in a contract you create enforceable rules for the future relations of the parties.

Descriptive statements are the fourth type of contract provision. Unlike obligations, rights and prohibitions, descriptive statements usually refer to things that happened in the past or are happening in the present (i.e., when the

contract is signed). The background section of a contract (sometimes called the recitals) is comprised of descriptive statements. If the client tells you the property is 2,000 square feet, and you want to add that information to the contract, what you need to draft is an example of a descriptive statement. Unlike obligations, rights and prohibitions, descriptive statements usually do not create enforceable rules.

B. Three Steps for Drafting Obligations, Rights, Prohibitions and Descriptive Statements

The cardinal rule for the court's enforcement of obligations, rights and prohibitions according to their plain meaning and intent is that the language of the provision must be "clear and unambiguous." *E.g., M & G Polymers USA, LLC v. Tackett,* 135 S. Ct. 926, 190 L. Ed. 2d 809 (2015) (If the words of a contract are clear and unambiguous, their meaning is to be ascertained in accordance with the contract's plainly expressed intent). Clarity is typically achieved in three ways: using consistent language, making sure provisions are complete and eliminating ambiguity. To address each of these issues, remember to take the following three steps whenever you draft a contract provision.

(1) Step One: Use consistent Language

Make sure you are consistent with the language you use to describe obligations, rights and prohibitions. In this book, I use "will" for obligations. So if I am drafting a buyer's agreement to buy the property, then the applicable contract provision will be "The Buyer will buy the Property." I will use "will not" for prohibitions. If lease prohibits pets, the applicable provision will be "The Tenant will not have pets." And I will use "may" for rights. If an employment contract gives an employer the right to terminate an employee for any reason or no reason, the provision will say "The Employer may terminate the

Employee for any reason or no reason."

Believe it or not, there is much scholarly debate in the literature about whether "shall" or "will" is the "correct" word to use for obligations. *E.g.*, Chadwick C. Busk, *Using Shall or Will to Create Obligations in Business Contracts,* Mich. Bar J. (2017). Some of the leading scholars in this area argue "shall" is correct, "will" is wrong. *E.g.*, Kenneth A. Adams, *A Manual of Style for Contract Drafting* (4th ed. 2017), Tina L. Stark, *Drafting Contracts: How and Why Lawyers Do What They Do* (2d ed. 2007). Others argue "will" is correct, "shall" is wrong. Brian A. Garner, *Guidelines for Drafting and Editing Contracts* (1st ed. 2019).
My position is either "will" or "shall" is appropriate as long as you are consistent (i.e., pick one or the other; don't use both in the same agreement). I personally think "shall" sounds old fashioned. It sounds like legalese. And it's not a word I would otherwise use in my writing. So, I don't use it in contracts either. I also prefer the tone of a contract that uses "will" not "shall." "Shall" reminds me of the Bible and the Ten Commandments. But I recognize "shall" is more commonly used in contracts than "will." And, again, some scholars argue "shall" is the only "correct" word to use. So, if you want to use "shall" and "shall not," that is your prerogative just be consistent.

There is no single word or phrase that works for all descriptive statements. But the language you use for descriptive statements should still be consistent. For example, if you write in an agreement the contractor will provide their own "tools, materials, and supplies," then you should use that phrase and only that phrase every time you describe what the contractor is required to provide.

(2) Step Two: Make Sure Provisions are Complete

Make sure your contract provisions are complete. To do that, ask what a colleague of mine used to refer to as the "w" questions: "who," will do "what," "to whom," "when," "where" and "how." Not all of those questions will apply to every obligation, right or prohibition you draft but you should have answers to as many of them as do apply. For example, a provision that says "the house will be painted red" is incomplete. Among other things, it doesn't say who will paint the house. And it doesn't say when the work will be done.

Also, when you transcribe information the client gave you, make sure you are specific and your transcription is accurate. If the client gives you a detailed description of the subject matter of an agreement, your description in the contract should be at least as detailed, and it should be accurate. It is usually not appropriate to paraphrase or summarize in a contract. Your document should typically be at least as detailed as the information you get from the client.

(3) Step Three: Use Unambiguous Language

Also make sure the language you use is clear and unambiguous. When you draft it is usually best to use short, simple sentences, be specific, and use defined terms to make your writing clearer. A provision that says "the Seller will paint the house within a month" may be complete but it is also ambiguous. What house will the Seller paint? How is it to be painted? How long is a month? Is it always 30 days or does it vary depending upon which month is involved? And within a month from when? When does the time period begin? You need to address those issues to make the provision clear.

Those are the basic principles you need to follow when drafting obligations, rights, prohibitions and descriptions. Use consistent language, make sure your provisions are complete, and also make sure they are clear. For each type

of provision, an active voice sentence structure is usually also preferable.

Active voice sentence structure				
The Buyer	**will**	**purchase**	**the Property**	**from the Seller for the Purchase Price on the Closing Date.**
Subject (party to agreement)	*Helping Verb (will, shall, agrees, promises)*	*Verb*	*Object*	*Who (to or from whom), When, Where and How*

B. Examples of Obligations, Rights, Prohibitions and Descriptive Statements

(1) Drafting Obligations

A tenant's agreement to pay rent to a landlord is an example of a obligation. To make it clear an obligation is intended, start with the name of the party you are assigning the obligation to, use a word like "will" as a helping verb, and just state what the person agreed to do, like this:

The Tenant will pay the rent.

To make the provision complete, ask yourself to whom will the rent be paid? How much is the rent? When is the rent due? And how is the rent to be paid? Then add the answers to those questions to your original provision, like this:

On or before the first day of each month, the Tenant will

pay rent to the Landlord in the amount of five hundred dollars ($500) by check or money order.

Assuming the rent actually is $500 per month, you have now drafted a clear, complete, and accurate obligation requiring the tenant to pay the rent.

One thing to avoid when drafting obligations is obligating the parties to come to an agreement in the future, like this:

~~The Landlord and the Tenant will agree on an appropriate late charge.~~

An agreement to agree is generally not enforceable. Plus, the whole idea of drafting a contract is to help the parties to come to an agreement now, and then put that agreement in writing. So you usually want to avoid drafting provisions indicating the parties "will agree" to things after the contract is signed.

If you represent the Landlord and you are thinking about contingencies and protecting the client's interests should they occur, you will also want to deal with the risk that the Tenant pays late or not at all. What can you do then to make the payment provisions in the agreement more effective?

One thing you can do is impose a deadline and a late fee if payments are late:

If the Tenant pays late, the Tenant will also pay the Landlord a late fee of $_____.

If that's not enough, have the fee accrue with time, so the later

the payment, the bigger the fee.

If the Tenant pays late, the Tenant will also pay the Landlord a late fee of %____ of the payment amount for every day that the payment is late.

When determining the amount of the late fee also keep in mind the purpose of the fee is to compensate the other party for the untimely performance. If the purpose or effect is to impose a penalty (e.g., if the amount of the fee is unreasonably large), the requirement to pay the fee may be unenforceable as against public policy. *See* Restatement (Second) of Contracts § 356 (1981).

(2) Drafting Rights

A landlord's right to conduct periodic inspections of the property is an example of a contract right. To draft a right, start with the party's name, use the word "may" as a helping verb, and then state what the person "may" do. Don't mix it up and use "may" for some rights and "can" or "has the right to" for others. Be consistent. Also, make sure each provision is complete by asking myself "who," "what," "to whom," "when," and "how," as applicable.

For example, to draft a right to inspect an apartment, start with a simple active voice sentence, using the word "may" before the verb, like this:

The Landlord may inspect the unit.

Then ask yourself when the inspection will occur and how it

must be done? Is notice required? To whom will it be given? And when will it be given? And add the answers to those questions to what you initially drafted, like this:

The Landlord may inspect the unit between the hours of 9:00 a.m. and 5:00 p.m. The Landlord will give notice to the Tenant at least twenty-four hours before the proposed inspection.

That is an example of a complete provision granting a landlord the right to inspect a unit, and obligating the landlord to give notice before doing so. But some aspects of the provision are not clear. What unit does the Landlord have the right to inspect? And what days of the week may the Landlord do the inspection? To rectify these ambiguities, the provision could be revised to read like this:

The Landlord may inspect unit #7 at 57 West Street, Sunnydale, Arizona (the "Unit") between the hours of 9:00 a.m. and 5:00 p.m. on any weekday. The Landlord will give notice to the Tenant at least twenty-four hours before the proposed inspection.

If the provision gets lengthy, you can break it up, as I did in that example. Every provision in a contract does not have to be a single sentence. But if you do break it up, continue to follow the same conventions. Don't say "Notice will be given to the Tenant...." Obligate someone to give the notice, even if it is implicit who that party is. Say instead "The Landlord will give notice to the Tenant...."

Also, there are a couple things to avoid when using the word "may." The first is to avoid giving someone the right to do something they already have the right to do, like this:

~~The Tenant may request that the term of the Lease be extended.~~

The Tenant can request whatever the Tenant wants to request. It is not necessary to give the Tenant the right to do something he already has the right to do.

The second is to avoid characterizing an obligation as a right. If you want the Tenant to return the keys to the property, do it like this:

The Tenant will return the keys to the Property to the Landlord.

Not like this:

~~The Landlord may receive the keys to the Property from the Tenant.~~

Among other things, if the Tenant doesn't return the keys, you want to be able to enforce a provision of the Lease obligating the Tenant to return them. A Lease provision saying the Landlord has the right to receive the keys will be of little use to you.

(3) Drafting Prohibitions

A provision taking away the tenant's right to have pets in the unit is an example of a prohibition. Since I am using the word "will" for obligations, I will use the phrase "will not" for prohibitions. I will not use any other phrase like "may not" or

"cannot."

To draft a prohibition, start with the same simple active voice sentence structure you have been using for obligations and rights:

The Tenant will not have pets.

The only "w" questions that apply here are where and when. So, the next step is to add the answers to those questions, like this:

The Tenant will not have pets in the Unit at any time during the Term.

And then make sure the provision is clear. For example, is the intent to prohibit typical household pets like dogs and cats, or would it also not allow a tenant to keep one or two gold fish in an aquarium. If the former, then the drafter should either create a defined term for "pets" or add language to the provision to clarify the intent, like this:

The Tenant will not at any time during the term keep in the Unit any pets that could either disturb other tenants or cause damage to the Unit, including dogs or cats but excluding aquarium fish or reptiles, or very small animals confined to indoor cages.

The primary thing to avoid when using “will not” is using that phrase for something that should be a descriptive statement, not a prohibition. If the agreement is for the tenant to have free access to the exercise room, don’t draft the applicable provision like this:

~~**The Tenant will not pay for access to the exercise room.**~~

You don’t need to prohibit the tenant from paying for that access. You just need to make clear they don't have to pay for that access. Saying a party doesn't have the obligation to do something is not the same as saying the party is prohibited from doing it. Use "is not obligated to" instead of will not. The former is a descriptive statement; the latter is a prohibition. What you want is a descriptive statement:

The Tenant is not obligated to pay for access to the exercise room.

(4) Drafting Descriptive Statements

The other type of provision you will find in contracts is a descriptive statement. Descriptive statements are past or present tense statements describing factual information in an agreement. Examples of descriptive statements include the provisions of the background section and representations and warranties.

To draft a descriptive statement, use the same simple active voice sentence structure you would use for other contract provisions. Make sure the factual information you include is accurate and complete. And even though there is no one word or phrase you can use to signal a descriptive statement, still be consistent with the wording you do use.

For example, to describe a seller's business in the background section of a purchase agreement, simply state what that business is, like this:

The Seller is in the business of selling the type of equipment described in this Agreement.

Also, since you initially refer to the subject of the agreement as "equipment", don't refer to it elsewhere in the agreement as "goods" or "supplies." Consistently use the word "equipment" every time you refer to the subject matter in the agreement.

Another example of a descriptive statement is a representation and warranty. If you want to include that type of statement in a contract, it is important to state who is making the statement and to whom it is being made, like this:

The Borrower represents and warrants to the Lender that it is a duly organized and existing New York corporation.

Representations and warranties actually serve two functions. One is to create a default if it turns out the information isn't true. If the borrower in the above example isn't duly organized and existing, and the lender finds out, the borrower will be in default, and the lender will be able to call the loan. The other is sometimes called an "audit function." When a party asks a corporation to represent that it is duly organized and existing, what the party really want is for the corporation's lawyer to check and make sure the corporation has been following all the required corporate formalities. In other words, you add the representation so the other party will check and make sure it's true before the document is signed.

The differences between a representation and warranty and any other descriptive statement are the following: (1) a representation and warranty is a statement that is relied on by the other party to enter into the agreement; and (2) the other party has the right to end the relationship or otherwise back

out of the deal if it turns out the representation and warranty is not true. So, for example, if one party is paying substantially more money for a small house because they were told the house was the boyhood home of former president George Washington, and, if it turns out that is not true, the party does not want to go through with the purchase, then that statement should be a representation and warranty.

When you are drafting descriptive statements beware of future tense statements. Often a future tense descriptive statement is more appropriately drafted as an obligation or a past or present tense statement. For example, a provision stating "the Equipment will be clean and ready for use by the Closing" is likely inappropriate. If you want to make sure Equipment is clean, you need to obligate a party to the agreement to clean it. A descriptive statement won't accomplish that result. Similarly, a provision stating "the Equipment will include batteries" is also likely inappropriate. If the Equipment includes batteries then make that part of the definition for the term Equipment. Alternatively, if you haven't defined the term Equipment include the batteries in your description of what the equipment is.

(5) Drafting Obligations, Rights, Prohibitions and Descriptive Statements Subject to Conditions

Obligations, rights, prohibitions and descriptive statements can all be subject to conditions. Conditions are usually drafted using an "if/then" formulation, drafting the "if" clause in the present tense and stating the consequences of the failure to satisfy the condition in the "then" clause. Here is an example:

If the Tenant fails to pay the Rent when due, then the Landlord may terminate the Lease.

Also, it is common practice to substitute “must” for "will" or “shall” in a condition to an obligation.

If the Tenant pays the Rent late, the Tenant must pay the Landlord a late fee of $25.00 per day.

When that convention is followed, it is also appropriate to add an interpretive provision stating that “must” signals a condition.

The hard part for a novice draftsperson is not so much drafting the provision correctly, it is recognizing when something the client tells you is an obligation, when it is a right, when it is a prohibition, and when it is a descriptive statement. Whenever one party wants to obligate another party to do something in the future, whether they use the words “agrees to,” or “is responsible for,” or “promises,” what they are describing is an obligation. If I were drafting the applicable provision, I would use the word “will” in that situation.

Whenever one party gives another party the right to do something in the future, whether they use the words “can” or “has discretion to,” that is an example of a right. In that situation, I would use the word “may” to draft the clause.

And when one party wants to prohibit another party from doing something, whether they use the words “can’t,” “may not,” or “prohibit,” they are describing a prohibition. If you are using "shall" for obligations, use "shall not" for prohibitions. As for me, I prefer to use "will not." What is important is not so much which word you choose, but that you use it consistently. To draft clearly and without ambiguity, you must distinguish among obligations, rights, prohibitions and

descriptive statements, and draft each type of provision the same way every time.

Practice Exercises

In the Appendix to this book there are instructions (either a memorandum from a senior attorney or a transcript of an initial client intake) for drafting the following contracts:

1. Associate Employment Agreement
2. Laptop Purchase Agreement
3. Residential Lease Agreement
4. Sale of Assets Agreement and
5. Consulting Services Agreement.

Before drafting one or more of those agreements, take each piece of information in the instructions and determine whether it should properly be drafted as an obligation, a right, a prohibition or a descriptive statement. To complete this exercise, use the following chart:

Information from Instructions	**Obligation ?** Draft using “will” or “shall”	**Right?** Draft using “may”	**Prohibition?** Draft using “will not” or “shall not”	**Descriptive Statement?** Draft as a Past or Present Tense Statement

3. AVOIDING POTENTIALLY AMBIGUOUS WORDS AND PHRASES

In addition to clearly, consistently and completely drafting obligations, rights, prohibitions, and descriptive statements, there are a number of potentially ambiguous words and phrases you need to avoid. Using “months” or the word “within” in deadlines can make them unclear. Misplacing time periods and dates in conditions can create ambiguity; and making an indefinite pronoun reference also makes a sentence unclear. It is important to avoid the mistakes of leaving the party out of obligations and attempting to obligate a non-party. Don't use phrases like and/or and etc. in an agreement. And avoid excessive legalese and redundancy in the contract provisions you draft.

A. Make Clear the Trigger Date, Duration, and End Date for Time Deadlines

Time deadlines are primary source of ambiguity in contracts.

You may not have thought about it, but a statement like “the Contractor will pay the Subcontractor within one (1) month” is rife with ambiguity. One month from when? The statement doesn’t say when the clock starts ticking. Which month? Not all months are 30 days long. February has twenty-eight days; January has thirty-one days. Is one month from February 15th, March 15th (the same day a month later) or March 17th (30 days later)? Also, can the Subcontractor pay on the last day or do they have to pay before the last day? Does "within" mean "on or before" or "before"? There is no clear answer to any of those questions.

To avoid these ambiguities, there are three things you need to address when you draft a time deadline. First, use language that clearly indicates whether payment can happen on the last day or if it must be received before the last day, like “on or before,” "before," “on or after,” "after," “no later than,” or “at least.” Don't use words like "within" or "by." So, you would start like this:

The Contractor will pay the Subcontractor on or before

Rather than use months to describe the time period (or even weeks), it is preferable to use days. Why? Because every day is twenty-four hours long, no matter which day it is. So, draft it like this:

The Contractor will pay the Subcontractor on or before the thirtieth (30th) day

And don’t forget to include the date the period starts to run. Some practitioners refer to that as the “trigger date.”

The Contractor will pay the Subcontractor on or before the thirtieth (30th) day after the Project is completed.

Also, ask yourself what should happen if the last day of the time period is a Saturday or Sunday or a legal holiday. Likely, it is not the parties intent to require performance on a weekend or a holiday. The way to remedy that is to add an interpretive statement, like this:

"Business Day" means Monday, Tuesday, Wednesday, Thursday or Friday, but does not include any federal holiday. If any deadline or time period in this Agreement ends on a day other than a Business Day, then performance is due on the next Business Day.

Now that is much clearer than “The Contractor will pay the Subcontractor within one (1) month.”

B. <u>Don’t “Sandwich” the Time Period in Conditions</u>

Conditions are another potential source of ambiguity in agreements. Drafting them is no different than the way you would do it normally (use “if” and “then,” “unless” or “except”). An obligation can be subject to a condition, a grant of rights can be subject to a condition, and a prohibition can be subject

to a condition. For example, failing to pay timely is usually the condition to incurring a late fee:

If the Contractor fails to timely pay the Subcontractor, then the Contractor must pay the Subcontractor a late fee in the amount of $25.00.

When you draft a provision like this be careful not to "sandwich" a time period in the middle of the condition. If you do that your condition will be ambiguous. Here is an example:

~~If the Contractor fails to timely pay the Subcontractor **on or before the thirtieth (30th) day after the Project is completed** the Contractor must pay the Subcontractor a late fee in the amount of $25.00.~~

Does the Contractor have to pay the Subcontractor on or before the thirtieth day after the Project is completed? Or does the Contractor have to pay the late fee on or before the thirtieth day after the Project is completed? The provision is ambiguous because the time deadline is "sandwiched" right in between the two phrases. It could apply to the first phrase or it could apply to the second phrase. To resolve this ambiguity, make sure you put the time deadline within the phrase to which it applies, like this:

If the Contractor fails to timely pay the Subcontractor, the Contractor must pay the Subcontractor a late fee in the amount of $25.00 **on or before the thirtieth (30th) day after the Project is completed** .

This principle applies to modifiers generally. A modifier is a word or phrase in a sentence that modifies another word or

phrase. If you misplace a modifier, the result is an ambiguous sentence. To rectify that issue, remember to always place the modifier as close as possible to the word or phrase it modifies.

C. Avoid Gender Pronouns

I would also recommend that you avoid gender specific pronouns like "he," "she," "his," and "hers" in your contracts. If you use them in a provision in a form document, like this: "the Broker will perform his duties to the satisfaction of the Seller," you are going to have to remember to change "his" to "her" every time the gender of the broker changes. Or you could have one set of forms for men and another set for women. But the preferred method would be to get into the habit of not using the pronouns at all, like this: "the Broker will perform the Broker's duties to the satisfaction of the Seller." Do that and you won't have to worry about checking all your pronouns every time you draft a document.

Another reason to omit pronouns is because they can be a source of ambiguity if not used properly. If you write a sentence like this: "The Contractor will arrange for delivery of the Equipment to the Subcontractor, at his sole cost and expense" it is unclear whether "his" refers to the Contractor or the Subcontractor. That is called an indefinite pronoun reference; and it also makes a sentence ambiguous. To fix it, omit the pronoun, like this: "The Contractor will arrange for the delivery of the Equipment to the Subcontractor, at the Contractor's sole cost and expense."

You should also note that using the words "they" or "their" as a substitute for gender pronouns does not solve the potential ambiguity in the previous sentence. If you had written "The Contractor will arrange for delivery of the Equipment to the Subcontractor, at their sole cost and expense" the sentence

would have still been ambiguous. So, I would also recommend you avoid gender neutral pronouns, unless it is clear who the pronoun refers to.

D. Don't Omit the Party from Obligations, Rights and Prohibitions

Make sure you don't leave the party out of your obligations, rights and prohibitions. In other words, don't write: "The house will have a concrete foundation." If you are drafting an obligation, you need to say who you are obligating to do the work. If you don't, you have created what's called a "false obligation." The obligation is there but it isn't given to anyone. To rectify that issue, you would instead say "the Builder will construct the house with a concrete foundation." Again, if you are drafting an obligation, right, or prohibition, start with the name of the party you are obligating, empowering, or prohibiting. And then, you won't have to worry about creating false obligations.

E. Don't Obligate, Prohibit, or Empower People Who Are Not Parties to the Contract

Also make sure you don't include non-parties in your obligations, rights, and prohibitions. For example, if your contract is between a Contractor and a Subcontractor, don't draft an obligation that purports to obligate employees of the Subcontractor to do something. The employees are not parties to the contract. Rather, obligate the Subcontractor to instruct its employees to do something or obligate the Subcontractor to ensure that they do it. So, don't write "Employees of the Subcontractor will obtain adequate training before operating the Equipment." Write something like "the Subcontractor will adequately train the Subcontractor's employees before permitting them to use the Equipment."

F. Avoid Using "And/Or" and Abbreviations like "Etc.", "Et Al." and "E.g."

The phrase "and/or" is yet another source of ambiguity. The word "or" means one, the other (either), or both, so just write "or", not "and/or". In a famous Florida case the court admonished against the use of "and/or", stating:

> *...we take our position with that distinguished company of lawyers who have condemned its use. It is one of those inexcusable barbarisms which were sired by indolence and damned by indifference, and has no more place in legal terminology than the vernacular of Uncle Remus has in Holy Writ. I am unable to divine how such senseless jargon becomes current. The coiner of it certainly had no appreciation for terse and concise law English.*

Cochrane v. Fla. E. Coast Rwy. Co., 145 So. 217, 218-219 (Fla. 1932). Instead of writing "The Tenant may use the patio and/or the lanai attached to the Unit," revise the language to read "The Tenant may use the patio attached to the Unit or the lanai attached to the Unit" or, if it is appropriate to make crystal clear the use of both is also permitted, then write "The Tenant may use the patio attached to the Unit or the lanai attached to the Unit or both."

It should go without saying that the abbreviation "etc." is not appropriate to use in a written contract; and writing it out as "et cetera" is not appropriate either. The abbreviation and the word mean "the rest." If you want to include "the rest" in a contact, you need to say what the rest is. Instead of writing, "the Unit is comprised of one bedroom, one bathroom, etc." say "the Unit is comprised of one bedroom, one bathroom, one living room, a galley kitchen, a covered patio and a single

parking space."

Similar abbreviations like "e.g." and "et al." should also be avoided for the same reasons.

G. Avoid Excessive Legalese

Avoid using excessive legalese in a modern business agreement. We don't wear powdered wigs anymore. We don't go to work on horseback. And no one still has wooden teeth. The 1800's have come and gone. We should use the language of the age in which we practice. We shouldn't use phrases like "witnesseth," "whereas," "hereinafter," "now therefore," or "hereinbefore" in contracts because no one talks that way anymore.

I know many lawyers would argue that adding just a little legalese here and there doesn't hurt anything and it makes the document look more "official." In other words, it's a matter of style. So, to be clear, if you are revising someone else's document that has legalese in it, I would not recommend that you go through the document and delete all the archaic expressions. But if you are drafting from scratch, my personal preference is to avoid using legalese altogether.

However, I also recognize the real problem is with overusing those types of archaic legal expressions. Consider the following example of an indentured servant agreement from the 1700's. This contract is very simple and short, but the legalese is so intense it is hard to decipher the intent. If you

want to understand why educators rail against legalese, try reading this document:

Indentured Servant Contract

This Indenture, Made the Fourth Day of August in the Twenty-ninth Year of the Reign of our Sovereign Lord George the Second King of Great Britain, And in the Year of our Lord, One Thousand Seven Hundred and fifty five Between William Buckland of Baford Carpenter & Joiner of the one Part, and Thomson Mason of London, Esq. of the other Part, Witnesseth, That the said William Buckland for the Consideration herein after-mentioned, hath, and by these Presents doth Covenant, Grant, and Agree to, and with the said Thomas Mason Executors and assigns, That He the said William Buckland shall and will, as a faithful Covenant Servant, well and truly serve the said Thomas Mason his Executors and assigns in the Plantation of Virginia beyond the Seas, for the Space of Four Years, next ensuing his Arrival in the said Plantation in the Employment of a Carpenter and Joiner. And the said William Buckland doth hereby Covenant and Declare himself, now to be the Age of Twenty two Years Single and no Covenant or contracted Servant to any other Person or Persons, And the said Thomas Mason for himself his Executors Or Assigns, in Consideration thereof, doth hereby Covenant, Promise And Agree to and with the said William Buckland his Executors, and Assigns, that He the said Thomas Mason his Executors or Assigns, shall and will at his or their own proper Costs and Charges, with what convenient Speed they may, carry and convey, or cause to be carried and conveyed over unto the said Plantation, the said William Buckland and from henceforth, and during the said Voyage, and also during the said Term, shall and

will at the like Costs and Charges, provide for and allow the said William Buckland all necessary Meat, Drink, Washing, and Lodging, fit and convenient for William as Covenant Servants in such Cases are usually provided for and allowed and pay and allow William Buckland Wages on Salary at the Rate of Twenty Pounds Sterling per Annum Payable Quarterly And for the true Performance of the Premises, the said Parties, the these Presents bind themselves, their Executors and Administrators, the either to the other, in the Penal Sum of Forty Pounds Sterling, firmly by these Presents. In witness whereof, they have hereunto interchanged by set their Hands and Seals, the Day and Year above-written.

Here is the same agreement without the legalese and applying the protocols I discussed in Chapters Two and Three:

Indentured Servant Contract

On August 4, 1755, William Buckland (Buckland) and Thomson Mason (Mason) agree as follows:

1. Buckland will serve Mason in the Plantation of Virginia for the term of four years as a carpenter and joiner.

2. Buckland represents to Mason that Buckland is twenty-two years old, single, and not contracted to serve any other person.

3. Mason will, at Mason's own cost, carry and convey Buckland to the Plantation.

4. Mason will, at Mason's own cost, provide necessary meat, drink, washing, and lodging for Buckland.

5. Mason will pay Buckland wages at the rate of twenty pounds sterling per annum payable quarterly.

Executed as of the date above.

That is much clearer than it was, isn't it? It turns out the agreement was very simple and straight forward. But the legalese was so excessive it obscured the substance of the agreement. To avoid that happening to the documents you draft, stick with modern English. Use the language people use today, not the language people used 300 years ago.

H. <u>Avoid Passive Voice</u>

Avoid passive voice when drafting contract provisions. If you write "the house will be painted red by the Seller," you are putting the focus on the house. But that's not what you want to do. You want to put the focus on the Seller, not the house. You are assigning the obligation to a person not a thing. And you do that by using active voice. In other words, you do that by writing it this way: "the Seller will paint the house red." Drafting an obligation, right, or prohibition, by starting with the name of the party you are obligating, empowering, or prohibiting ensures you don't run afoul of this rule or the

preceding two rules.

The only exception I can think of is for the exordium and the testimonium. Both of those sections are typically drafted as passive voice statements. When drafting either one, it is acceptable to put the focus on the document, not the parties, since both of those statements describe the execution of the document itself, not the provisions of the agreement between the parties.

I. Write Numbers Consistently

There are three common ways to write a number in a contract. You can write the number numerically. You can write the number in words. Or you can write the number in words and also numerically in parenthesis, like this:

30
Thirty
Thirty (30)

You have probably noticed I have been writing numbers out in words, then putting the numeral in parenthesis in this book. There is a simple reason I got into the habit of doing it that way, and that is because I have found it is harder to make a mistake when you write a number out. Writing $1,917,432 instead of $1,197,432 seems like a relatively minor typo. I just transposed the 9 and the 1. But that little typo could result in a $720,000 malpractice claim, if it isn't corrected before the document is signed.

Spelling plaintiff with three (3) f's in an appellate brief, might cause a little damage to your reputation, but doing that will not likely cause any monetary harm. In contrast, typos

involving numbers in contracts, especially big dollar numbers, can have a direct adverse monetary impact on the drafter. That is why I prefer to spell numbers out, especially when I am referring to large dollar amounts.

Also, in practice I primarily handled finance transactions, and dollar amounts in promissory notes are always written out (like they are written in checks). So, instead of writing $100,000, I would write the number out, like this:

One hundred thousand and 00/100 dollars ($100,000.00).

But I also recognize that no one way of writing numbers is any more or less clear than any other. In other words, how you choose to write numbers in an agreement is another matter of style. So just be consistent with how you chose to do it.

J. Proofread for Clarity and Consistency

Remember, the whole point of all these rules is to make sure the provisions you draft are "clear and unambiguous." That is primarily accomplished through consistency and organization. As a result, you have to be very meticulous to draft well. You have to proofread your agreement, not just for typos and grammar, but also for clarity and consistency. And you have to check to make sure you include all the appropriate contract provisions, and they are properly organized.

There are a variety of software programs that will help you with proofreading. I know "Grammarly" is popular with law students. But I personally prefer "PerfectIt" for this type of work. The reasons are because PerfectIt checks documents for internal consistency errors, including hyphenation,

capitalization, paired punctuation, bullets, numbers, figures, and headings. And it does "American Legal Style" checks (it makes 125,000 legal-specific corrections that a trained legal writer would look for, including citation corrections.

But you don't need a computer to do the work. The first thing you want to do is double check your assigning memo or client interview notes in three ways. Make sure you have everything the client wanted to include. Make sure the information in your agreement accurately describes what the client wants. And make sure your descriptions are at least as detailed as the information the client gave you. Then check the agreement carefully. Make sure defined terms are consistently capitalized. Make sure you also refer to specific information in the agreement consistently. And make sure you have correctly followed the drafting conventions in this book (i.e., you consistently use "will" or "shall," your document contains all the appropriate provisions, in the appropriate places, correctly numbered and with sufficient headings.

Pay extra attention to time periods to make sure you articulate them clearly. Be clear what the trigger date is, how long the duration is in days, and whether the last day is included. Make sure modifiers are as close as possible to the words or phrases they modify, especially when you articulate a condition. Solve the indefinite pronoun reference problem by not using them at all. Don't leave the party out of obligations, rights, and prohibitions; and don't put nonparties in obligations, rights, and prohibitions. Avoid ambiguous phrases like and/or and etc. Watch out for excessive legalese in contract provisions. Draft in active voice and write numbers consistently. Also, pay extra attention to large dollar amounts. Lawyers are trained to pay close attention to language, but it is the numbers that can really get you into trouble.

Now that we have covered how to clearly and unambiguously draft obligations, right, prohibitions and descriptive statements, and what potentially ambiguous words and phrases to avoid, we will next talk about how to organize the provisions of a contract. Sentences are made clear by keeping them simple, accurately and precisely describing factual information, and drafting the same provisions the same way. A contract is made clear by grouping and ordering the contract's provisions in an organized way. That is the subject of the next few chapters.

Practice Exercises

Correct the errors in the following contract provisions:

1. The Buyer will pay the Seller $100,000 (one hundred thousand dollars) within a week after the completion aforementioned Project.

2. If the Buyer desires to inspect the Property, they will use their inspector. Notice of the approval of said inspection will be provided by the Buyer prior to Closing.

3. Whereas, notice will be provided by document, paper, writing, hard copy and/or physical form, etc., no other communication, signal, utterance or notification shall be herewith required.

4. After approval the Seller's employees will construct the Project. Only materials listed in the Specifications will be used, unless the Buyer notifies the Seller of her waiver of any particular specification and her approval of any substitute material.

5. If the Buyer fails to pay the Seller by a month the Buyer

will pay the Seller a late fee of in the amount of $25.00.

4. ORGANIZING A CONTRACT'S BEGINNING SECTIONS

Agreements typically start with a title, then an introductory paragraph that identifies the parties, the document, and the date. There is no requirement to include a background section, but it is often helpful to include one. In a short document, definitions are usually created

in context; but in a longer document, when you have a lot of definitions, it is often advisable to include a definitions section. The same is true of representations and warranties. If you have a lot, it would be best to create a section for them and put the section near the beginning of the agreement. Those are the beginning sections of a contract. In this chapter I will discuss how to draft each section clearly and unambiguously.

A. Identify the Type of Agreement in the Title

Contracts typically start with a title describing the type of agreement involved. If you are drafting a lease agreement for the rental of a residential apartment, don't just title it "Agreement." That doesn't distinguish it from any other agreement. And don't write a title that goes too far in the other direction, like this: "Agreement between Landlord Corp. and Tammy Tenant Concerning the Rental of the Apartment at 123 Main Street in Gainesville, Florida." That's too much information. Most of it belongs in the body of the agreement, not the title. Just identify the type of agreement, like this:

APARTMENT LEASE

I capitalized, centered, and underlined the title to make it stand out. You can also use bold to make a title (or a heading) stand out in an agreement (or some other combination of one or more of those four techniques). But don't do things like italicizing letters, making the font bigger, or using any type of graphics. That will just make the agreement look tacky. Keep it professional!

B. Start with an Exordium (Preamble or Introduction)

After the title there should be an introductory section called

the "exordium." ("Exordium" is Latin for "a beginning" or "commencement." Lewis & Short, *Latin Dictionary*.) The exordium is a description of what the parties are doing (entering into a contract). It contains the date of the agreement, the identity of the parties, and the title of the document, as well as short-hand references for the parties and the document. There are two ways to do it. One is passive voice and puts the emphasis on the document, like this:

This Apartment Lease (Lease) is entered into on this___ day of _____, 20__, by and between Landlord Corp., a Florida corporation, having an office at 57 West Street, Gainesville, Florida (Landlord) and Tammy Tenant of 75 First Street, Gainesville, Florida (Tenant).

The other is active voice and puts the emphasis on the parties, like this:

On _____ ___, 20__, Landlord Corp., a Florida corporation, having an office at 57 West Street, Gainesville, Florida (Landlord) and Tammy Tenant of 75 First Street, Gainesville, Florida (Tenant) enter into this Apartment Lease (Lease).

I personally prefer the active voice form, but many attorneys also use the other one. What is important in drafting an exordium is not so much the form you use, but the information you include and the way you express that information. To identify a person, you need the person's full name and address. To identify an entity like a corporation, you need the entity's name and address, but you also need to know the state in which the entity was organized. This information is important for a number of reasons.

First and foremost, a contract entered into with the wrong party or something that is not an actual party, is worthless. If you start a real estate purchase agreement by stating "Lancaster Williams" is the seller, but title to the property is actually held by "Lancaster Family Trust," you have made a serious mistake. If you are drafting an agreement for the purchase of business assets and you state the seller is "Frannie's Pizza," your contract is no good. "Frannie's Pizza" may be the name of the business but it is not a person or entity. You must state the name of the owner, Frannie Salpietro, and then you can add "d/b/a Frannie's Pizza."

Second, you must include addresses to further identify the parties and enable them to provide notice to each other. A loan agreement may require a lender to give a borrower notice of default, so it is helpful if the agreement says where the borrower is located. If the same agreement is breached and the lender wants to sue the borrower, it will, again, be helpful to know where the borrower can be served with the summons and complaint.

When you draft the exordium, you must express this information accurately. Make sure you have the party names correct. Also, when you refer to the document the parties are entering into, make sure you describe it accurately. Don't say the parties "enter into this rental agreement" if you have titled the contract "apartment lease." State the parties "enter into this apartment lease."

Finally, if the date of the agreement is different than the date it is signed, date the agreement "as of" the effective date in the exordium, or define the "Effective Date" in the body of the agreement.

After the exordium, you need to insert what are called

"words of agreement." In older agreements, you would do that by saying something like "Now, therefore, in consideration of the mutual covenants herein contained, the parties agree as follows" or "Now, therefore, for good and valuable consideration the sufficiency of which is hereby acknowledged, the parties agree to the following." But today the preferred practice is to leave out the legalese and the recitation of consideration and just add the following sentence to the end of the exordium: "The parties mutually agree as follows." Alternatively, If a background section is included (discussed below), it is common to add "Accordingly, the parties agree as follows" after the background section. Either way is fine.

C. Consider Including a Background Section

After the exordium you may want to include a background section. A contract does not have to have a background section, but it is often helpful to include one. For example, you may want to explain the events that led up to the creation of the contract or the context within which the contract is signed. If you are drafting an employment agreement, you could do something like this:

I. Background of Agreement

A. Search for Employees. The Employer conducted a nationwide search for qualified trial attorneys by posting an advertisement in the journal of the American Bar Association.

B. Submission of Resume. The Employee responded to the advertisement by submitting a current resume listing the Employee's education, employment and outside

affiliations (Resume), a true and accurate copy of which is attached to this Agreement as Exhibit A.

C. Offer of Employment. The Employer interviewed the Employee and offered the Employee employment; and the Employee accepted the offer.

I also used this section to authenticate the employee's resume, and I created a short-hand term for that document. I did that so I would have a simple but accurate way to refer to the resume in the body of the agreement. For example, I might want the employee to represent to the employer that the statements in the Resume are truthful. If it turns out the employee was lying, that would constitute a breach, enabling the employer to end the relationship.

Another reason you may want to do a background section is to describe the parties and the subject matter of the agreement. For example, if you were drafting an equipment lease, you might do something like this:

I. Background of Agreement

A. Business of Food Service Corp. Food Service Corp. is in the business of operating food service kiosks in shopping malls in Northern Central Florida.

B. Equipment for Kiosks. Food Service Corp. has determined that it is in its best interests to lease, rather than purchase the kitchen equipment for its food kiosks.

C. Business of Supply Corp. Supply Corp. is in the

business of leasing commercial kitchen equipment to restaurants and other food service providers in Florida.

D. Equipment for Lease. This Agreement concerns the following pieces of equipment: one Vulcan VC44GD - Double Deck Gas Convection Oven, Mfg Part#: VC44GD, one Anets SLG100 - Commercial Gas Fryer, 70 to 100 Lb. Oil Capacity, Mfg Part#: SLG100, one True T-49F - Commercial Freezer - Two Door - Reach-In - 49 Cu. Ft., Mfg Part#: T-49F-HC and three Kratos TT-244 - Stainless Steel Work Tables with Galvanized Undershelf, 48"Wx24"D, Mfg Part#: KRA-4824 (collectively, the Equipment).

I used this background section primarily to describe the subject matter of the contract, which is the kitchen equipment, and create a short-hand reference for the Equipment. What is most important in this section is that the description is accurate and complete. Later in the agreement I will obligate Supply Corp. to lease the equipment, stating something like: "Supply Corp. will lease the Equipment to Food Service Corp. for $_____." If the definition is not accurate and complete, that obligation will not work, and neither will any of the other provisions involving the Equipment.

I was also very specific when I described the Equipment. If I had said the Equipment consisted of "an oven, a fryer, a freezer and three (3) worktables," the description would have been ambiguous. So, another way to achieve clarity is to be specific when you describe something, especially something important like the subject matter of the contract.

D. Use Short-Hand References (Definitions)

After the background section you may also want to include a section listing all the defined terms in the agreement. The phrase "defined terms" is a misnomer. What we are really talking about is short-hand references; but they are commonly referred to as definitions. To this point, I have been defining terms within each sentence as they came up. Doing it that way, the convention is to describe the item in detail then put a short-hand reference in parenthesis, capitalizing the first letter of each word and putting quotation marks before and after the reference. So, if you had a statement describing a car in a purchase and sale contract, it might look like this:

The subject matter of this Agreement is a 1963 Ferrari 250 GTO having the chassis number 4153 GT (the "Car").

Don't put the definition before the description, put it after. So, in the example above, don't say "the subject matter of this Agreement (the Car) is a 1963 Ferrari 250 GTO with chassis number 4153 GT." Put the definition, (the Car), at the end of the description. Also, some practitioners either bold or underline the reference when it is first defined. Doing that will help the reader locate in line definitions in a longer agreement.

The reason for doing all this is to be absolutely clear you are referring to the most expensive car ever sold: the 1963 Ferrari 250 GTO, with the chassis number 4153 GT (the car that won the Tour de France), whenever you refer to the Car in the agreement. You don't want to have to repeat all that information every time you refer to the Car, but you still want to make sure your references to it are clear, accurate, and complete. And the definition accomplishes that result.

When you are drafting definitions, avoid including rights, obligations and prohibitions in your definitions. They should

all just be descriptive statements.

This Contract concerns the sale of the land with the building thereon located at 51 West Street in Miami, Florida consisting of 3 acres and a 3,000 square foot 3 bedroom, 2 bathroom home with attached 2 car garage (the Property) . ~~**The Buyer may inspect the Property prior to the sale. If it is acceptable, the Buyer will buy the Property for $300,000.00. While this Agreement is in effect, the Seller will not market the Property to anyone else.**~~

Also, avoid unnecessary definitions. Don't create definitions that just restate what something is, are not short-hand references, and serve no purpose in the contract.

~~The Company is in the business of selling greeting cards (Greeting Cards) to customers in central Florida (Customers) at retail establishments (Establishments) in local shopping malls (Malls).~~

In fact, if you are drafting a simple contract, it is often only appropriate to define the parties, the subject matter and the agreement itself. So be careful not to overdo it with definitions!

If you have multiple terms in an agreement, it is sometimes better to put all the definitions in one place, usually at the beginning of the agreement, right after the background section. The convention is to alphabetize the list of terms, put each term in quotes instead of parenthesis, capitalize the first letter, use the word "means," and then state a detailed description. Here is an example from a loan agreement:

II. <u>Definitions of Terms</u>

The following terms have the following meanings:

"Loan" means the loan of $100,000.00 to the Borrower by the Lender pursuant to this Agreement.

"Loan Documents" means (i) the Note; (ii) the Mortgage; and (iii) this Agreement.

"Mortgage" means the Mortgage of even date from the Borrower to the Lender granting the Lender a mortgage on the Mortgaged Property.

"Mortgaged Property" means the land, together with all the buildings and improvements on the land, situated at 123 Main Street in Gainesville, Florida.

"Note" means the Promissory Note of even date made by the Borrower in the amount of One Hundred Thousand Dollars ($100,000.00), payable to the order of the Lender.

I didn't define the terms Lender, Borrower or Agreement in the list because those terms would have already been defined in the exordium.

The important thing is that the presentation is clear, accurate, and complete. If the actual loan amount is $1,000,000 not $100,000 then it doesn't matter what form is used. The document has a problem. If there is a security agreement in addition to the mortgage, then the definition of the Loan Documents, and all the references to it in the loan agreement, will not accomplish their intended purpose. The same thing is true if there is a typo in the property address. It is important to

learn the forms that are typically used for drafting contracts, but not at the expense of substance. Ultimately, it is the substance that matters most.

E. <u>List Representations and Warranties, if Applicable</u>

After the definitions section, if there is one, you will on occasion want to include one more section; and that is a statement of the representations and warranties a party relied on in entering into the contract. Like definitions, representations and warranties can just be included within each provision as they come up. For example, in the background section of the employment agreement mentioned earlier, you might add a representation, like this:

* * *

C. <u>Submission of Resume.</u> The Employee responded to the advertisement by submitting a current resume listing his education, employment, and outside affiliations (Resume), a true and accurate copy of which is attached to this Agreement as Exhibit A.

D. <u>Accuracy of Information.</u> The Employee represents and warrants to the Employer that the information in the Resume is truthful and accurate.

However, if you have multiple representations and warranties you want to include in an agreement, it is usually better to put them all in one place, right after the background and definitions sections. Just make it clear who is making the representations and to whom they are being made. And since these are descriptive statements, use present or past tense.

Here is an example from a purchase and sale agreement:

III. Representations and Warranties of Seller

The Seller makes the following representations and warranties to the Buyer:

1. Pumping of Septic. The Seller arranged for the pumping of the septic on the Property once per year for every year the Seller has owned the Property.

2. Potability of Water. The water from the well on the Property is potable.

3. Permits for Improvements. The Seller obtained a permit for all improvements done to the Property.

4. Storage or Disposal of Waste. The Seller did not store or dispose of any hazardous wastes on the Property.

You need to be careful not to overdo representations and warranties by including what should be background statements (e.g., descriptions of the subject matter of the agreement), obligations, rights and prohibitions. Here are examples statements incorrectly listed as representations and warranties:

III. Representations and Warranties of Seller

The Seller makes the following representations and warranties to the Buyer:

~~1. Features of Car. The Car is a black four-dour sedan with a six-cylinder engine, and four-wheel disc brakes.~~

~~2. Sale of Car. The Seller will sell the car to the Buyer.~~

~~3. Inspection of Car. The Buyer may inspect the car before the Closing.~~

~~4. Use of Car by Seller. After this Agreement is signed the Seller will not use drive the car for any distance, except in connection with the inspection.~~

After the performance of a purchase agreement (i.e., after the closing occurs) the substantive rights and obligations of the parties end. If the purpose of the representations is to give the party receiving them the right to cancel the agreement if it turns out they are not true, then they are fine the way they are. But if you want the party receiving the representation to be able to take legal action if that party discovers the representation is false after the transaction closes but before the applicable statute of limitations expires, then you need to state in the agreement that the representation "survives" the closing, like this:

* * *

2. Potability of Water. The water from the well on the Property is potable. This representation and warranty survives the closing of title under this Agreement.

* * *

F. Add Headings to Sections and Subsections

As you can see, I started each of these sections with a heading describing the content. When you change to a new topic, you should add a heading before you start. And when you draft the heading, consider the same issues discussed at the beginning of this chapter on titles. Try to avoid one-word headings, like "Payment." Ask yourself "who," "what," "when," "where," or "how," depending upon which applies. So, in this case, ask, payment for what? And use the heading "Payment for Rent." Instead of "Restrictions," use "Restrictions on Use." Instead of "Termination," use "Termination of Services."

Also, if you have multiple subsections under the heading, number them (or use letters). As long as the subsections are not just an itemized list, add headings to the subsections as well. The only exception is if you just have one subsection. In that case, don't number or letter it, or give it a separate heading. Only add headings to subsections if you have two or more subsections.

You will also notice I broke the text up in each of these sections instead of grouping it all into one paragraph. These sections are short enough that either way would have probably been fine. On the one hand, you shouldn't feel like every sentence in an agreement has to be in a separate section. Grouping provisions that concern the same subject matter is a good practice to get into. On the other hand, if your section is getting bigger than about half a page, it is probably time to break it up.

To recap, a contract typically starts out with a title and an exordium. To complete the exordium, you will need the name,

address, and state of organization of the parties. Next is a background section, which you can use to describe the events leading up to the contract, or the parties and the subject matter. If it is a sale of goods contract, describe the goods involved. If it is a services contract, describe the services.

A short agreement will not need a definitions section, but a lengthy document containing a lot of defined terms may need one. Representations and warranties can also be included in the background section or in the body of the agreement if there are only a few of them. But in a longer, more complex document, involving a long list of representations, the better practice is to include a representations and warranties section. Those are the sections you will typically find in the beginning of contracts. Follow the advice in this chapter to draft each section clearly and without ambiguity.

Practice Exercises

Begin drafting the Associate Employment Agreement, Laptop Purchase Agreement, Residential Lease Agreement, Sale of Assets Agreement and/or Consulting Services Agreement you chose for the practice exercise at the end of the previous chapter.

Draft the beginning sections of the contract(s) by determining what information is properly included in the title, exordium, background section, definitions and representations and warranties, if applicable, and then drafting each of those provisions.

5. ORGANIZING THE BODY OF A CONTRACT

Now that we have gone through title, exordium, background, definitions and representations, and warranties sections, we can finally get into the meat of the agreement: the core obligations and duration, if applicable. Then the provisions of the agreement , organized by substance or chronologically, whichever is clearer, and the ending sections of the agreement, which I will cover in the next chapter.

A. Start with the Core of the Agreement

Agreements typically consist of an exchange of bilateral promises. For an agreement to work, the drafter needs to obligate both sides to do what they agreed to do. Usually, the best practice is to start broad and then get more specific. That means the agreement should start with the core obligations: a statement of the basic exchange between the parties.

I will go over three types of agreements; each involves a different core exchange. The first type is a term agreement that governs the relationship of the parties over time. An example of that is an apartment lease or employment agreement. An agreement like that will need a statement of duration or term in addition to the core obligations.

The second type is a purchase and sale agreement, like a real estate purchase and sale agreement, or an agreement for the purchase of a business or equipment. A purchase and sale agreement will usually describe a due diligence period, and then a closing when the real estate or goods is exchanged for the purchase price.

And the third type of agreement is one that involves a transfer of rights, like a mortgage, an assignment of leases and rents, or a software license agreement. I'll give you examples of all three types of core provisions.

The core obligations for a lease might look like this:

IV. Lease of Property

The Landlord will lease the Property to the Tenant; and the Tenant will lease the Property from the Landlord.

Or this:

IV. <u>Lease of Property</u>

The Landlord will lease the Property to the Tenant; and the Tenant will pay the Landlord rent as provided in this Agreement.

The first example obligates the tenant to lease the property but doesn't mention rent, while the second example does. If you do it the first way, you will have an additional obligation requiring the tenant to pay rent. After both versions you will want to subsequently state things like what the rent amount is, when it is due, and how it is to be paid. You can put some of those details into the core obligations, as long as it doesn't get unwieldy. But again, the idea is to state the basic exchange first, and then get into the details later.

Here is an example of the core obligations for a purchase and sale agreement, which is an agreement that involves a transaction or exchange after a due diligence period:

IV. <u>Sale of Condominium</u>

The Seller will sell the Condominium to the Buyer; and the Buyer will purchase the Condominium from the Seller for the Purchase Price on the Closing Date.

I was able to draft these obligations very concisely because I used a few defined terms. As long as the definitions are also accurate and clear, the obligations should work to bind both sides to do what they agreed to do.

And here is one more example. This one is from a mortgage

and security agreement. In that type of agreement, there usually is no core exchange of obligations. Rather, the core of the agreement is simply a transfer of rights, like this:

IV. <u>Grant of Mortgage</u>

The Borrower mortgages, grants, and conveys the Property to the Lender as security for the Loan.

I didn't use the word "will" here because this is not an obligation. The Borrower is not going to mortgage the Property sometime in the future. The mortgage is granted when the agreement is signed. The core of this type of agreement is actually a descriptive statement, describing what the party is doing (e.g., transferring ownership, granting rights, releasing liability).

B. <u>Describe the Duration or Term, if Applicable</u>

If you are drafting a term agreement, you will have to describe the term (how long the relationship will last). Also, since the term may not start right when the contract is signed, it is advisable to state the beginning and end dates. Here is an example of a duration provision in an agreement:

V. <u>Term of Rental</u>

The rental period is for three (3) years, beginning on September 1, 2020 and ending on August 30, 2020 (the Term).

If the term renews, then you would add a statement to that effect, like "the Term renews automatically unless either party sends the other party a notice of non-renewal at least thirty (30) days before the end of the Term."

C. Then Draft the Specifics of the Deal

Once you have drafted the core obligations, and a duration provision, if applicable, spell out in detail the specific terms of the deal with a series of additional obligations, rights and prohibitions, as applicable. Obviously, the sections of the agreement will differ depending on whether the agreement is for a purchase and sale, like an agreement to buy real estate, or a relationship over time, like a lease, or if the agreement involves a transfer of rights, like a mortgage.

(1) Purchase and Sale Agreement

If the document is a contract for the purchase and sale of a condominium, for example, the seller would be required to produce the condo docs, provide the buyer with a title insurance commitment, and draft a settlement statement before the closing date. As a result, the provisions following the core obligations might look like this:

V. Organizational Documents for Condominium

On or before the seventh (7th) day after this Agreement is signed, the Seller will provide the Buyer with the condominium documents for the Property, including the master deed, declaration of trust, and bylaws.

IV. Insurance Policy for Title

No later than fourteen (14) days before the Closing Date, the Seller will provide the Buyer with a title insurance commitment issued by a Florida licensed title insurer, with

legible copies of instruments listed as exceptions.

VI. Statement of Closing Costs

At least twenty-four (24) hours before the Closing Date, the Seller will provide the Buyer with a completed Settlement Statement for the closing, detailing all costs and charges to be incurred by the Buyer and the Seller in connection with the sale of the Property.

Similarly, the buyer might be obligated to apply for financing for the purchase, have the right to inspect the property, and have the right to a final "walk through" before the closing occurs. As a result, a series of additional provisions might look like this:

VII. Inspection of Property

On or before the fifteenth (15th) day after this Agreement is signed, the Buyer may inspect the Property. If the Buyer determines that the Property is not acceptable to the Buyer, the Buyer may terminate this Agreement by delivering written notice of such termination to the Seller prior to the expiration of this inspection period.

VIII. Application for Financing

On or before the thirtieth (30th) day after this Agreement is signed, the Buyer will apply for financing for the purchase of the Property, and use diligent efforts to obtain approval for such financing, in the amount of no more than $_____ at an initial interest rate of no less than %____

for a term of no more than _____ years. If the Buyer is unable to obtain such approval after the exercise of diligent effort, then the Buyer may terminate this Agreement by delivering written notice of such termination to the Seller prior to the expiration of this financing period.

IX. Walk Through Before Closing

On the day prior to the Closing Date, the Buyer may perform a walk-through inspection of the Property to confirm all items of personal property purchased by the Buyer have remained on the Property and Seller has maintained the Property as required in this Agreement.

(2) Term Agreement

If the agreement is for a relationship over time, like an equipment lease, then the core obligations might be followed by provisions relating to shipment, use, maintenance, and access, like this:

I. Shipment of Equipment

The Retailer will arrange for the shipment of the Landscaping Equipment to the Office Complex on the first day of the Term, and the shipment of the Landscaping Equipment back to the Retailer on the last day of the Term.

II. Use of Equipment

The Office Complex will use the Equipment in a safe and appropriate manner at all times. The Office Complex may

permit its employees to use the Landscaping Equipment, if the employees have received appropriate training.

III. Maintenance of Equipment

The Office Complex will perform routine maintenance of the Landscaping Equipment, in accordance with the owner's manual for each piece of the Landscaping Equipment, during the Term of this Agreement.

IV. Access to Equipment

The Retailer may inspect the Landscaping Equipment at the Office Complex any time from 8:00 a.m. through 5:00 p.m., Monday through Friday.

(3) Agreement for Transfer of Rights

If the agreement involves a transfer of rights, like a mortgage, then the core transfer may be followed by requirements for the payment of indebtedness and taxes, maintaining the property and repairing damage, and complying with leases, like this:

1.1 Compliance with Loan Documents

The Borrower will perform and observe all of the terms and conditions of the Loan Documents, including the obligation to make any payments as required in the Loan Documents.

1.2 Payment of Taxes

The Borrower will pay or cause to be paid all taxes, water, sewer and other utility charges, and all other charges or assessments relating to the Property or the materials stored on or in the Property and other charges and encumbrances which are or may become a lien on the Property, prior to the time when interest or penalties would accrue on such amounts.

1.3 Maintenance of Property

The Borrower will keep the Property in good order, repair and condition, reasonable wear and tear excepted, and will not permit, commit or suffer any waste, impairment, deterioration or environmental contamination of the Property.

1.4 Repair of Damage

The Borrower will promptly repair, restore, rebuild, replace, or alter as necessary any portion of the Property which may be damaged or destroyed by fire or other casualty, as nearly as possible to the condition such improvements were in prior to such damage or destruction. The Borrower will give the Lender notice of any damage to the Property no later than five (5) business days after any such damage occurs.

1.5 Compliance with Leases

The Borrower will comply with and observe its obligations as landlord under leases affecting the Property.

Depending upon the circumstances, it may be best to organize the provisions of the contract by substance. For example, you may organize an agreement with all the payment provisions in one section, and additional rights and obligations with respect to the services in another section.

But there may also be situations where it works best to organize provisions chronologically. For example, in the condominium purchase and sale agreement mentioned earlier, the seller produces the condominium documents first, and then the buyer inspects the property. After that, the buyer applies for financing. If it is approved, the seller generates a settlement statement and the Buyer does a final walkthrough, and then the final closing is held.

Start with a general statement of the core exchange and then fill in the details as you work your way through the document. If a chronological organization makes sense, then organize the supplemental provisions chronologically. If something else works better, do something else. Clarity is the goal so whatever expresses the specifics of the deal in the clearest way is the structure you should use.

Practice Exercises

Continue drafting the Associate Employment Agreement, Laptop Purchase Agreement, Residential Lease Agreement, Sale of Assets Agreement and/or Consulting Services Agreement you have been drafting as the practice exercise for the previous chapter.

Draft the body of those contracts(s) by determining what information belongs in the core obligations section

and term, if applicable, and the remaining obligations, prohibitions, rights, descriptive statements and conditions, and then drafting each of those provisions.

6. ORGANIZING A CONTRACT'S ENDING SECTIONS

The ending sections of a contract usually deal with the end of the relationship. If the contract has a term, you should think about whether it is appropriate to include a termination provision or a cancellation provision. If the contract involves a closing, you will want to describe the logistics for making that happen, as well as dealing with the situation where the closing falls through. If the document is something like a security agreement, you may just need to

provide for the termination of the security interest at the end of the relationship. A list of administrative provisions (a/k/a "boilerplate") is usually included next, then a final concluding statement (a "testimonium") and signature blocks.

A. If the Contract is a Term Agreement, Draft Provisions for Ending it Early

If the contract has a term or duration, then you will likely want to draft provisions for ending the relationship voluntarily by either cancelling or terminating it. Many attorneys use those terms interchangeably but there is a distinction between the two you should be aware of in the Uniform Commercial Code. Here is the relevant provision in the Florida version of the Code:

> * * *
>
> *(3) "Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On termination, all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.*
>
> *(4) "Cancellation" occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of "termination" except that the canceling party also retains any remedy for breach of the whole contract or any unperformed balance.*
>
> *Fla. Stat. § 672.106.*

Cancellation is ending the contract because the other party breached; termination is ending the contract for any other reason. Both cancellation and termination are grants of rights.

So, if you were giving the lessor in an equipment lease the right to cancel, you would do it like this:

> **5. Cancellation by Lessor**
>
> **If the Lessee breaches any of the provisions of the Lease, the Lessor may cancel.**

Like any other provision, you want to make sure it is complete. In this case, what is missing is how the lessor would go about cancelling the lease.

> **5. Cancellation by Lessor**
>
> **If the Lessee breaches any of the provisions of the Lease, the Lessor may cancel by giving the Lessee written notice.**

Termination is similar. If you wanted to give the lessee the right to terminate, you might draft something like this:

> **6. Termination by Lessee**
>
> **The Lessee may terminate the Lease for any reason.**

But again, you would need to say how termination is accomplished. And since termination can happen at any time for any reason, you would likely want to add a time deadline.

> **6. Termination by Lessee**

The Lessee may terminate the Lease for any reason by giving written notice to the Lessor no later than thirty (30) days before the proposed termination date.

B. If a Security Deposit was Required, Provide for its Return

In a term agreement, like an apartment rental agreement, there may be a security deposit involved. If there is, then in addition to ending the relationship, the contract will also have to deal with the ultimate disposition of deposited funds. For a security deposit, you will at least need an obligation requiring the tenant to pay the deposit at the beginning of the agreement, then a provision at the end giving the landlord the right to deduct amounts for damages, and then requiring the landlord to return the balance, like this:

7. Disposition of Security Deposit

The Landlord may deduct from the Security Deposit costs and expenses incurred by the Landlord to repair damage to the Unit caused by the Tenant during the Term. The Landlord will send the Tenant the balance of the Security Deposit no later than thirty (30) days after the end of the Term.

C. If the Contract is a Purchase and Sale Agreement, Draft Provisions for Closing Logistics

If you are drafting an agreement for a purchase of real estate or goods, you will need to describe the time and place of closing,

as well as all the things each party is required to bring to the closing for the transaction to happen. Those things are sometimes called "closing deliveries." Here is a short example:

8. Closing of Sale

A. The closing is to occur at 10:00 a.m. at the offices of Dewey, Cheatham, and Howe, 999 Court Street, Alachua, Florida (the "Closing").

B. At the Closing, the Seller will execute and deliver to the Buyer the following documents:

(i) a quitclaim deed for the Property;

(ii) keys to all doors on the Property and the post office box for the Property;

(iii) access information for smart locks, garage doors, gates and fences on the Property;

(iv) remote control devices for appliances and other systems on the Property; and

(v) operating manuals and warranties for all appliances on the Property.

C. At the Closing, the Buyer will deliver to the Seller, by wire transfer to the Seller's account, One Hundred Twenty-Five Thousand Dollars ($125,000.00) in immediately available funds.

D. If the Security Deposit Serves as Liquidated Damages in the Event of a Breach, Provide for its Disposition in That Situation as Well.

An agreement for a sale often involves a deposit which serves as liquidated damages for one of the parties if the other fails to complete the transaction. If it does, the agreement should also provide for the ultimate disposition of the deposit if the transaction falls through. For example, a purchase and sale agreement for real estate will often provide as follows:

9. Retention of Deposit

If the Buyer fails to fulfill the Buyer's obligations in this Agreement, the Seller may retain all deposits made by the Buyer under this Agreement as liquidated damages.

E. If the Contract Involves a Transfer of Rights, There May be Little to Do

An agreement involving a transfer of rights is performed when it is signed, so there may be no need to provide for the end of the relationship. Still, something like a mortgage might have a provision obligating the mortgagee to execute and record a discharge when the underlying loan is paid. Also, it is possible for this type of agreement to have a term. For example, a software license agreement could be for a limited period of time. If that were the case, you would consider adding termination and/or cancellation provisions, if appropriate. Otherwise, you may not have to deal with how the relationship ends.

F. End with Descriptions of Administrative Policies

The administrative policy statements that are usually

included at the end of agreements are often called "boilerplate" provisions. The nickname suggests they are universal generic provisions you copy and paste at the end of every contract. However, not every "boilerplate" provision is appropriate for every contract. Provisions may or may not be enforceable, depending on state law; and the applicable law may require that they be drafted one way or another. Common examples include merger, modification, choice of law, choice of forum, severability, assignability and successors and assigns clauses.

(1) Merger

A merger provision states the parties' intent with regard to integration (i.e., it states that the contract is complete). 11 Williston on Contracts § 33:23 (4th ed.). A merger provision is a descriptive statement, not an obligation, grant of rights, or prohibition. Here is an example:

1. Merger of Agreement

This Agreement is the complete and final agreement between the parties regarding the sale of the Business. All prior statements, understandings, and agreements are merged into this Agreement.

If the agreement is integrated (i.e., complete), the parole evidence rule renders inoperative prior written or oral agreements. Restatement (Second) of Contracts § 213 (1981).

(2) Modification

I think of a "modification" provision as the corollary to a merger provision. A merger provision deals with statements

and agreements made before the contract is signed. A modification provision deals with agreements made after the contract is signed. A modification provision is not a grant of rights; the parties already have the right to modify the contract. It could be drafted as a condition to an obligation. "If the parties want to modify, they will only modify in writing." Or it could be a prohibition. "The parties will not modify orally." But drafting it that way does not really accomplish the desired effect. You don't want to sue the other party for breach; you want the modification to be invalid. For that reason, I would draft the provision as another policy statement, like this:

2. <u>Modification of Agreement</u>

Any amendment of this Agreement is invalid unless it is in writing, signed by both parties, and states the nature of the modification, and the provision to which it applies.

An agreement for the sale of goods cannot be modified orally if it contains a modification provision. Uniform Commercial Code § 2-209(2) (2002) ("A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded"). However, any other type of written contract can likely be orally modified, even if it contains such a provision, if it is proven that the provision was orally waived. 10 Williston on Contracts § 29:42 (4th ed.).

(3) <u>Choice of Law</u>

A choice of law clause states the parties' choice for the law applicable to the contract. It is another clause that can only be drafted as a descriptive statement. It is not an obligation; you can't obligate the judge to apply a specific state's law. And it is

not a grant of rights or a prohibition. Here is an example:

3. <u>Choice of Law</u>

This Agreement is governed by Florida law.

The traditional rule is that the law of the place where the contract was made governs the rights and obligations of the parties, 23 Williston on Contracts, § 63:10 (4th ed.), but the more modern rule is that contracts are governed by the law of the state that "has the most significant relationship to the transaction and the parties." Restatement (Second) of Conflict of Laws § 188(1) (1971). Often a choice of law clause simply confirms that law applies to the contract.

The parties can choose a different state's law but the Courts will not enforce that choice if either "(a) the chosen state has <u>no substantial relationship</u> to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) application of the law of the chosen state would be <u>contrary to a fundamental policy</u> of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which . . . would be the state of the applicable law in the absence of an effective choice of law by the parties." Restatement (Second) of Conflict of Laws § 187 (1971) (emphasis added).

The chosen state has a substantial relationship to the parties or the transaction when the state is "where performance by one of the parties is to take place or where one of the parties is domiciled or has his principal place of business." *Id.* at comment f. Important considerations in determining whether a fundamental public policy of the state of the otherwise applicable law exists are "the extent to which the

significant contacts are grouped in [the] state" and "the extent to which the significant contacts are grouped in the state of the chosen law." *Id.*

If the parties to a contract are located in one state, and performance is to take place in the same state, then choosing another state's law is likely not an option. But if one or both parties is located in another state, or performance is to take place in another state, then a choice of law clause naming that other state's law as the law applicable to the contract may be enforceable.

(4) Choice of Forum

A choice of forum clause states which forum the parties choose for litigation arising out of the contract. A choice of forum provision could be drafted as a condition to an obligation. "If either party sues, they will do so only in the chosen forum." Or it could be drafted as a prohibition: "if either party sues, they will not do so in any forum other than the chosen forum." But it wouldn't make sense to draft it as a grant of rights (the parties already have the right to sue in the applicable forum).

Like a choice of law clause, I would recommend drafting a choice of forum clause as a descriptive statement. Also, it is important to make clear that the chosen forum is sole or exclusive forum for litigation. If you don't draft it that way a court might interpret it to mean filing in that forum is permitted but not required. 7 Williston on Contracts § 15:15 (4th ed.).

4. **Choice of Forum**

The sole and exclusive venue for any litigation arising out of this Agreement lies in Jefferson County, Florida.

The decision of which forum is appropriate for a breach of contract case usually depends on where the parties reside or where the cause of action accrued (in a breach of contract case where the cause of action is for some failure of performance, the cause of action would likely accrue where the contract is to be performed). If there is only one forum where cases can be brought then the parties simply confirm that is the applicable forum in the clause.

However, the parties can also choose a different forum, and the courts will enforce that choice, as long as the clause is not unfair or unreasonable. 7 Williston on Contracts § 15:15 (4th ed.). For example, such a clause would likely not be enforced if it was "obtained by fraud, duress, the abuse of economic power or other unconscionable means . . . the chosen state would be closed to the suit or would not handle it effectively or fairly. . . there is good reason to believe that the plaintiff would be dealt with unfairly in the chosen state . . . [or] the chosen state would be so seriously an inconvenient forum that to require the plaintiff to bring suit there would be unjust." *Id.*

(5) Severability

A severability clause states the parties' intent that illegal or unenforceable provisions be severed, and the other provisions continue in effect. It is usually drafted as a descriptive statement.

5. **Severability of Agreement**

If any provision is of this Agreement is unenforceable, that provision is severed, and the remaining provisions continue in effect.

(6) No Assignments

A no assignments clause prevents the parties from assigning their rights under an agreement to a third party. It can be drafted as a prohibition, an obligation or a descriptive statement. Regardless, for the provision to be enforced, it must refer to the "rights" of the parties under the agreement, not just the "agreement" itself. John E. Murray, Jr., Corbin on Contracts vol 9, § 49.9, 214 (rev. ed., Mathew Bender & Co. 2007). Also, in many states it must also provide that any purported assignment is "void." Id. at § 74:22.

6. No Assignments

The rights of the parties under this Agreement are not assignable. Any purported assignment of such rights is void.

Contract rights are generally assignable unless "the assignment would materially change the duty of the obligor or materially increase the obligor's burden or risk under the contract or the contract involves obligations of a personal nature." However, the parties often do not intend for their agreement to be assigned to a third party. To effectuate that intent, a no assignment clause is needed.

(7) Successors and Assigns

A successors and assigns provision attempts to make the contract binding on any successor or assignee. And it is usually drafted as a descriptive statement.

7. Successors and Assigns

This Agreement inures to the benefit of and is binding on all permitted successors and assigns.

It would be inappropriate to include this clause (or at least the reference to assigns) if assignments are prohibited. Also, depending upon state law, the provision may not be enforced unless the assignee expressly assumes liability. *See e.g.*, *Pelz v. Streator Nat. Bank*, 145 Ill.App.3d 946, 951-52, 496 N.E.2d 315, 319-20 (1986).

Those are a few examples of common "boilerplate" provisions. I'll discuss a few more in the next chapter.

G. Draft a Testimonium (Closing Statement) Before the Signature Blocks

After the administrative provisions of a contract comes something called the "testimonium." (Testimonium is Latin for "witness" or "attestation." Lewis & Short, *Latin Dictionary.*) In the old days, the testimonium would contain lots of legalese. For example, one style was to end the contract with a statement like this: "Witness our hands and seals this ___ day of _____, 20__." Today we leave the legalese out and just recite in plain English that the parties are signing as of the date in the exordium. That way the document doesn't have multiple different dates, and it is clear what the correct date is. Here is a sample testimonium:

Executed by the parties as of the date above.

H. Draft Appropriate Signature Blocks for Each Party

After the testimonium there is just one more thing needed to make the contract complete and that is a set of signature blocks, one for each party. What is most important when doing the signature blocks is distinguishing between a person who is signing as an individual and a person who is signing on behalf of an entity. If the former, the person will be personally liable for damages resulting from any contract breach. If the latter, the entity, not the person, will bear that liability.

Here is an example of a signature block for an individual:

_____
[Name of Signer]

And here is an example of a signature block for an entity (a corporation):

_____
[Name of Corporation]
By: [Name of Signer] [Title]

If the party is an entity containing another entity, like a limited partnership with a corporation as its general partner, you would do the signature block like this:

Realty Associates L.P.,
By its General Partner,

_____
[Name of Corporation]
By: [Name of Signer] [Title]

To finish a contract, think about how the relationship will end and whether any funds need to be accounted for, including any money held on deposit. Then draft appropriate policy provisions. Most of the time they should be done as descriptive statements. Add a testimonium but leave out the legalese. And draft appropriate signature blocks, depending upon whether each party is a person or an entity.

Those are the basic elements of a contract. Now that you have learned the basics of how to draft and organize contract provisions, you should be able to draft a simple contract. You may be at a closing and the parties may need someone to draft an escrow agreement right then and there. You may also be a litigator handling a case that settles on the courthouse steps, and you may have to draft the settlement agreement before everyone goes home. In either case, you should be able to draft a simple contract based on what you've learned so far.

Contract Organization

Title

Exordium

Words of Agreement

1. Background
2. Core Covenant
   [Duration]
3. Deal Provisions
   a. Chronologically
   b. By Topic
4. End of Relationship Provisions
   [Termination and/or Cancellation]
5. Administrative Provisions a/k/a Boilerplate

Testimonium

Signature Blocks

Practice Exercises

Continue drafting the Associate Employment Agreement, Laptop Purchase Agreement, Residential Lease Agreement, Sale of Assets Agreement and/or Consulting Services Agreement you have been drafting as the practice exercise for the previous chapter.

Draft the ending sections of those contracts(s) by determining what information belongs in the termination section, if applicable, administrative provisions, testimonium and signature lines, and then drafting each of

those provisions.

7. ADDING VALUE BY ADDRESSING COMMON CONTINGENCIES

There are some contingencies that you will likely want to address in virtually every contract you draft. For example, if you represent a buyer of property or services, how can you ensure the client is not provided with property that is in disrepair or defective, or services that are of poor quality? If you represent a seller of goods or services, how can you protect the client from the possibility the client will have trouble getting paid at some point in the future? What if you are on the other side, representing a client who may, for innocent reasons, be late making a payment after the agreement is signed? What can you do to help both parties to avoid the cost and expense of any future litigation? What if the client gets sued by the other side or some third party? What can you do to limit the client's exposure to liability? Because these issues are so common, you should be aware of how they are typically addressed.

1) Ensure the Condition of Property and the Quality of Services

Most contracts involve the sale or rental of property or services, so the first place where value can be added is in ensuring the condition of the property and the quality of the services. If the client is buying property and the seller is agreeable, consider adding a representation and warranty confirming, for example, the roof on a house does not leak, or equipment is in "good operating condition." (Even better, provide that the representation "survives" the closing, so the client can enforce it after the deal is done.) If the client is purchasing some service, consider qualifying the provider's obligation to provide the services "in a good and workpersonlike manner" or pursuant to some other quality standard. And in both cases, be sure to include a deadline for the delivery of the property or provision of the services.

For example, if the client tells you they agreed to have their kitchen renovated for $25,000, it would be "correct" to draft the obligation to renovate like this:

A. The Contractor will renovate the Owner's kitchen.

But what happens if the Contractor is busy and keeps putting off the renovations? The lawyer should anticipate that and propose a deadline. And what happens if the renovations are done but the Contractor doesn't do a good job and the Owner is unhappy? The lawyer should anticipate that as well and propose that the renovations meet some reasonable standard for the quality of work. Here is a revised example of the obligation to provide these services.

A. The Contractor will renovate the Owner's kitchen in a good and workpersonlike manner, and complete the renovations on or before _____ __, 20_.

Another thing you can do is draft a clause making clear that timeliness is material to the agreement, so that lateness is a material breach. This is typically done by stating that "time is of the essence."

16. <u>Time of Essence</u>

Time is of the essence with respect to the Tenant's obligation to pay rent in this Agreement.

When you draft a time is of the essence clause be clear what obligation(s) the clause applies to. *See* 3A Corbin, Contracts § 715 (1960) ("It is not desirable to try to achieve this result by merely putting into the contract the words "time is of the essence of this contract."").

You can also add that if it is necessary to sue to collect unpaid amounts, the losing party will pay the costs of doing so. But, unless you draft the language to apply only to just the other party, which the other party is unlikely to agree to, this type of provision has the risk of hurting your own client.

17. <u>Costs of Collection</u>

The losing party will pay all reasonable attorneys' fees and costs incurred by the prevailing party in enforcing this Agreement.

You should always be thinking not just about the form, but also about the substance of what you are drafting. You need to make sure what you are doing accurately represents the terms the parties agreed to. But you should also be trying to think of ways to better protect your clients' interests. You should always be looking for opportunities to add value to the deal.

2) <u>Avoid Disputes Between the Parties</u>

If you are on the other side of the transaction, and you represent the person making the payments, you should consider the possibility that your client may – for reasons that are not the client's fault – find himself or herself in breach of the agreement. If that occurs, what can you do to help the client avoid getting sued? What can you do to give the client the opportunity to fix the situation, so that the contract is not cancelled, and the relationship can continue?

One thing you could do is add a grace period to the payment provisions. To do that, you leave the due date the same, but change the late fee so that it doesn't start until the end of the grace period, like this:

C. On or before _____ ___, 20__, the Buyer will pay the Seller $_____.

D. If the Buyer pays more than five days late, the Buyer will also pay the Seller a late fee of $_____.

Another way to avoid litigation is for one party to give the other party notice and an opportunity to cure before commencing litigation.

18. Notice and Opportunity to Cure

Buyer and Seller will provide each other with written notice of any default by the other under this Agreement, and a period of five business days following the other party's receipt of such notice to cure such default.

4) Handle Disputes Outside of Litigation

Often it is in the interests of both parties to resolve any disputes without resorting to litigation. This is particularly true for disputes over a relatively small amount, like the amount of deposits routinely collected in connection with residential purchase and sale contracts and residential leases. What can you do in a situation like that to help the parties avoid litigation?

This issue is most commonly addressed by having the parties agree up front to resolve any disputes through mediation or arbitration. Here is an example of an obligation to mediate disputes.

19. Mediation of Disputes

Before resorting to litigation, the Buyer and Seller will attempt to settle any disputes arising out of this Agreement in an amicable manner through mediation with a Florida certified or court appointed mediator pursuant to the Florida Rules for Certified and Court-Appointed Mediators. The parties will each pay half the costs of such mediation.

If the client wants the mechanism to be binding on the parties, and the client's concern with avoiding disputes is not so much with the cost of litigation but rather with the technical nature of the contract and likely unfamiliarity of any civil judge or jury with the issues dealt with in the contract, arbitration may be another option. Unlike mediation, arbitration is binding, and you can arbitrate a dispute with an arbitrator who has expertise in a specific area. For example, you could draft a provision requiring the parties to submit disputes to an arbitrator who has expertise with technology, like this:

20. Arbitration of Disputes

The parties will submit any controversy or claim arising out of or relating to this Contract, or any breach of this Contract, to be resolved and determined by binding arbitration administered by a member of the Florida Circuit Civil Mediator Society having case experience with technology pursuant to the Florida Arbitration Code, §§ 682.01 through 682.25, Fla. Stat. Each party will pay half the costs of such arbitration.

Other issues which can also be dealt with in a mediation or arbitration clause include how the mediator or arbitrator will be selected, where and when the mediation or arbitration will take place, what law will apply, and whether attorney's fees are recoverable. When you are drafting a mediation provision or an arbitration provision it is important that you include all essential terms, so that the agreement is specific enough to be enforced by a court. *See e.g.*, *Davis v. Hearthstone Senior Communities, Inc.*, 155 So.3d 1232, 1234 (Fla. Dist. Ct. App. 2015), following *Malone & Hyde, Inc. v. RTC Transportation,*

Inc., 515 So.2d 365, 366 (Fla. Dist. Ct. App. 1987).

5) Take Advantage of Seller Protections in the Uniform Commercial Code

If the contract is for the sale of goods, you can take advantage of the provisions of the Uniform Commercial Code to better protect the client's interests. For example, Section 2-316(2) of the UCC gives a seller the right to exclude or modify implied warranties:

> *[T]o exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."*

As you can see, the exclusion has to be conspicuous. Section 1-201 of the Code defines conspicuous as follows:

> *(10) "Conspicuous," with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is "conspicuous" is a decision for the court. Conspicuous terms include the following:*
>
> *(a) A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the*

> *surrounding text of the same or lesser size; and*
>
> *(b) Language in the body of a record or display in larger type than the surrounding text or set off from surrounding text of the same size by symbols or other marks that call attention to the language.*

The statute also says merchantability must be mentioned. To exclude both implied warranties, you might draft something like this:

> **21. EXCLUSION OF IMPLIED WARRANTIES**
>
> **THE IMPLIED WARRANTIES OF MERCHANTIBILITY AND FITNESS FOR USE ARE EXCLUDED FROM THIS AGREEMENT.**

This form would be preferable to using phrases like "as is," and "with all faults" if the contract contains explicit warranties but excludes implied warranties.

Section 2-719(3) of the Code gives a seller the right to limit or exclude consequential damages, as long as the limitation or exclusion is not "unconscionable":

> *Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.*

A contract provision is "unconscionable" if there is "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *E.g., Bynum v. Maplebear Inc.*, 2016 WL 552058 (E.D. N.Y. 2016) (citing text). Unconscionability may also exist if parties are not represented by counsel, are unsophisticated or have unequal bargaining power. *E.g., Maslowski v. Prospect Funding Partners LLC*, 944 N.W.2d 235 (Minn. 2020). In other words, an unconscionable contract is a contract of adhesion "drafted and imposed by a party of superior strength that leaves the subscribing party little or no opportunity to alter the substantive terms, and only the opportunity to adhere to the contract or reject it." *McKenzie Law Firm, P.A. v. Ruby Receptionists, Inc.,* 108 Fed. R. Serv. 3d 312 (D. Or. 2020). To show that a provision is not unconscionable, it may be appropriate to draft the provision so that it demonstrates it was "voluntarily" assented to.

For example, if you were adding the exclusion of consequential damages clause to a contract drafted solely by counsel for one party having superior bargaining strength over the other unrepresented party, and you wanted to ensure the enforceability of that clause under those circumstances, you would likely do more than just make clear the clause only applies to commercial losses. To attempt to demonstrate the other party had a meaningful choice to accept or reject the clause, you might consider giving that other party the option in the contract to either accept the exclusion or reject it and pay a higher price for the goods. Also, it might make sense to include in the recitals that the other unrepresented party was a sophisticated businessperson who was given ample opportunity to retain counsel prior to signing the agreement. Here are two examples of a clause excluding consequential

damages. Both are drafted as descriptive statements, but the second version is expanded to address issues raised in the case law on unconscionability.

22. <u>Exclusion of Consequential Damages</u>

Consequential damages for commercial loss are excluded from this Agreement.

22. <u>Exclusion of Consequential Damages</u>

Consequential damages for commercial loss are excluded from this Agreement, unless the Buyer elects to pay the Seller two times the Purchase Price for the Goods by initialing below and making such payment.

Buyer acknowledges that the Buyer is a sophisticated businessperson, familiar with these types of agreements and has had a reasonable opportunity to consult with counsel concerning the legal effect of this provision.

_____ Buyer rejects the exclusion of consequential damages, and elects that such damages are included. Buyer will pay two times the Purchase Price for the Goods.

Section 2-725 of the Code also gives the parties the right to shorten the statute of limitations for claims arising out of the agreement:

An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

To shorten the statute of limitations, you might draft something like this:

23. Period of Limitation

The period of limitation for any action for breach of this Agreement is two years after the cause of action accrued.

But be aware that the law in some states prohibits the parties from shortening the statute of limitations. *E.g.,* Fla. Stat. § 95.03 (1975).

6) Release a Party from Future Negligence Claims or Limit a Party's Liability for Breach of Contract Claims

If the client does get sued by the other party to a contract, how can you protect the client against liability or at least limit its exposure to claims by the other party? In addition, what can you do to protect the client against a claim by a third party?

You obviously can't draft a provision in a contract releasing a party from future claims for breach of contract. If you did, the contract would be illusory. But you can draft a

clause releasing a party from future negligence claims, and in many jurisdictions the clause would be enforceable as long as it is freely and knowingly assented to and the language "clearly, unambiguously, and unmistakably inform[s] the party relinquishing its rights of exactly what is being waived." 8 Williston on Contracts § 19:21 (4th ed.). Here is an example of a contractor's release of future negligence claims against the owner of the property that attempts to inform the signer of the rights they are relinquishing:

The Contractor releases the Owner from and against all claims, causes of action and lawsuits, including negligence claims, the Contract now has now or at any time in the future arising out of the construction of the Property. The Contractor assumes the risk of accident and injury to the Contractor as a result of providing the Services, including the risks of using power tools and other construction equipment, and the risks of working alone and with others in and around an unfinished building and a partially excavated lot.

In addition to releasing future negligence claims, you can limit a parties' liability to the other side for future breach of contract claims. Contract clauses limiting liability of one or both of the parties are enforced as long as "the intention to limit liability is made clear in the contract," and the limitation does not violate public policy. *See e.g., Rosenberg v. Cape Coral Plumbing, Inc.*, 920 So.2d 61, 64 (Fla. Dist. Ct. App. 2005); *Orkin Exterminating Co. of South Fla. v. Clark*, 253 So.2d 884, 885 (Fla. Dist. Ct. App. 1971).

The Contractor's liability to the Owner for any breach of this Agreement is limited to the total fees paid by the

Owner to the Contractor for the Services. The Contractor is not liable to the Owner for any indirect, incidental or consequential damages.

Courts will also enforce a liquidated damages clause as long as it is not unconscionable, determined to be a penalty, or violates public policy. 24 Williston on Contracts § 65:1 (4th ed.).

If the Contractor breaches any provision of this Agreement and the Owner terminates, then the Owner may keep the Deposit plus interest as liquidated damages.

In general, the amount agreed to must be reasonably close to the actual damages likely to flow from a subsequent breach. *Id.* If the amount is, for example, the amount of an earnest money deposit provided to a seller of property in a purchase and sale agreement; and the liquidated amount is far in excess of the amount of actual damages likely to be incurred (i.e., if the clause has the effect of penalizing the other party), then it won't be held up in court.

7) Protect Against Third Party Claims

The client may also have the risk of being sued by a third party. The classic case is where the services are provided to a property owner. If someone gets hurt, the service provider will get sued, and the owner will likely be sued as well. Under these circumstances, protecting the client from liability can be achieved by making sure the client will be indemnified for any losses the client incurs (i.e., the other party to the contract will pay if the client is sued by a third party). An indemnity provision is an obligation running from

the "indemnitor" to the "indemnitee." Typically, the language used is "[the indemnitor] will indemnify and hold harmless [the indemnitee] from and against _____." Also, an indemnification provision should mention negligence claims and claims seeking attorney's fees, if they are included; and it should be limited to claims arising out of the applicable transaction or relationship, so that it is not overbroad. Here is a sample provision:

24. Indemnification of Claims

The Subcontractor will indemnify and hold harmless the Owner, its officers, directors, agents, and employees, from and against all third-party claims, causes of action, lawsuits and proceedings, including claims for negligence, requesting damages, including personal injuries, property damages and economic losses, and reasonable attorney's fees, arising out of the lease of the Equipment.

The client is less likely to have to pay a judgment if the person or entity providing the services has enough money to pay for the loss. As a result, it is also appropriate to make sure the other side has insurance for the types of claims that might arise from the performance of services (or any damage to property or equipment rented). Like an indemnity clause, an insurance provision is also an obligation. In addition to requiring the party to obtain insurance, it should require the party to "maintain" the insurance (i.e., not let the insurance lapse). Also, it is important to mention the type of insurance required and the policy amounts, as well as add language requiring the party to add the other side as an additional insured or loss payee and produce proof of insurance upon request, like this:

25. <u>Insurance for Equipment</u>

The Subcontractor will maintain insurance covering liability for personal injury in the amount of at least $_____, loss and damage to the Equipment for not less than full replacement value of the Equipment, which is $_____, and property damage insurance in the amount of at least $_____.

The Subcontractor will name the Owner as a beneficiary or additional insured under the applicable policies. The Subcontractor will also provide the Owner with copies of certificates evidencing all such insurance.

Those are some examples of the types of provisions you might use to protect a client from future contingencies. Contract drafting is not just writing. You need to think of all the things that could happen in the future, and all the ways a deal could go wrong. Then draft language that will protect your client should any of those contingencies occur. Brainstorming is where you really have the opportunity to provide valuable advice and draft an effective agreement.

Get up to speed first, then draft clear, consistent provisions and organize them in into a contract. After you do that, brainstorm. Think into the future about all the different things that could happen after the agreement is signed and make sure the client's interests are protected should any of those contingencies occur.

Practice Exercises

Review the contract(s) you drafted as the practice exercises for the previous chapters (the Associate Employment Agreement, Laptop Purchase Agreement, Residential Lease Agreement, Sale of Assets Agreement or Consulting Services Agreement) and determine whether there are additional provisions you could add to further or better protect the client's interests, and then draft the applicable provisions.

8. DRAFTING WITH PRECEDENT DOCUMENTS

Most of the contracts you will be hired to draft have already been done before. Whether you are asked to draft a lease, a real estate purchase agreement, a promissory note, a mortgage, a deed, a contract for the sale of goods, a services contract, or an employment agreement, it's been done before, various examples and forms are widely available, and there is usually no need to reinvent the wheel. Law students are prohibited from copying language drafted by someone else, but lawyers do that all the time. Your law professor is testing you on how well you can draft on your own. But your client doesn't care if you copied the language you are using, as long as it works. You can't violate anyone's copyright, but otherwise you can collect well -drafted provisions and documents and use them to draft whatever type of contracts you need. Still, there is much more to drafting with precedents than just copying what someone else has already done.

To be clear, when I say "draft" in this context, what I am referring to is creating the form of agreement you need from

one or more precedents (i.e., documents someone else wrote). So, you are not starting from scratch, like you were in chapters one through seven. And the precedent is either a form (it has blanks in in) or a sample (it contains factual information from a prior transaction).

When you are working with precedents, the drafting process is usually divided into creating the form you need (the subject of this chapter) and then tailoring the form for the deal you are involved in (the subject of the next chapter). And there are two ways to create the form you need from one or more precedents.

The first method for drafting with precedents is to find a sample agreement that is close to what you are trying to do, and then revise it to create exactly the document you want. The second method, which applies when you can't find a sample that is close to what you are trying to do, is to find sample provisions from documents that are not what you are looking for, and use those sample provisions to piece together the document you want.

I handled a lot of lending transactions in my practice. Whenever I had to draft something like a promissory note or a mortgage, I had no problem finding sample documents to use. By using a precedent instead of drafting from scratch, I was able to save a lot of time, and I could charge the client less money to get the transaction closed. That is an example of the first method.

As another example, I also had a client who hired me to draft an option to purchase air rights to construct residences over commercial real estate in an urban area. I couldn't find a sample document that was anything close to what I needed. But I was able to draft an appropriate agreement by looking at analogous situations and using sample language from a number of different documents. That is an example of the

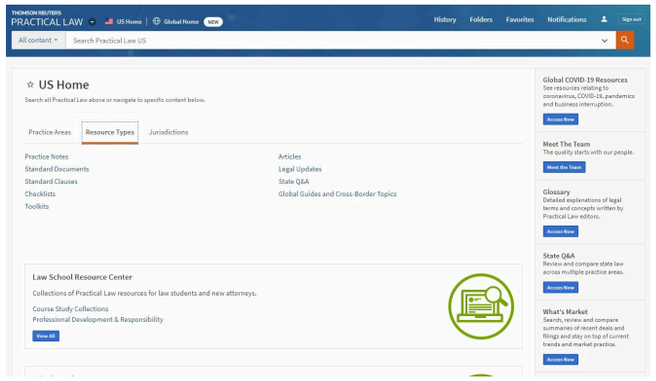
second method.

Regardless of whether you are able to find a precedent that is close to what you want or you have to piece a document together using multiple precedents, there are three steps to the process. Start with a good source for sample documents. Review any document you find to determine if it is appropriate for the client and the transaction you are involved in. Revise the document, if appropriate, to create the form you need; and make sure the language in the resulting form is consistent throughout.

A. Find a Good Source for Precedent Documents

The first step is to find a good source for forms and sample agreements. A law library is usually a good place to start. Secondary source texts covering transactional topics like real estate, leasing, lending and finance often have sample forms. Also, most libraries have continuing legal education materials containing precedent documents. Often the forms and samples are in a CD-ROM included with the text, so you can copy the documents you are interested in without having to re-type each form.

The internet is a good source of sample documents as well. Westlaw has a service called "Practical Law" that is a good source for form documents. Westlaw can be costly to use, but there are also plenty of free sites online. The Securities and Exchange Commission service called EDGAR (Electronic Data Gathering, Analysis, and Retrieval) is free a source that can be used to search for sample business documents. Also, there is a free website called ONECLE (www.onecle.com) that is a potential source for sample agreements.



But I would recommend that you stay away from internet sites like Rocket Lawyer and LegalZoom. You can't give a client a document they could have obtained themselves by visiting a website for consumers. Also, because sites like that are widely available, as a practical matter, you have to produce a better document than what those sites sell. No reasonable savvy client is going to pay you to draft a contract if they can get something just as good by going online.

Finally, if you work for a law firm, the firm will probably also have a collection of forms and sample documents you can use. Even if they don't, the other transactional attorneys you work with will likely have their own stash of forms and sample documents. So, law firms and other lawyers are a good repository for precedent documents too.

B. Determine if the Precedent is Appropriate for the Client and the Transaction

Once you have found a precedent to work with the second step is to determine who it was drafted for (i.e., a seller or a buyer, a lender or a borrower, a landlord or a tenant, etc.) and under what circumstances (i.e., a consumer transaction or a commercial transaction, in the state where you are practicing

or somewhere else, for a very large deal or a very small deal, etc.).

If the document was drafted for a client with interests like those of your client, and it was intended for a transaction similar to the one you are involved in, then it may be a good sample to use. If it wasn't then you should probably keep looking.

For example, you likely wouldn't want to use form language from a lease written on behalf of a landlord in a contract you are drafting for a tenant. And it likely wouldn't be appropriate to use provisions from a residential lease to use for a lease of commercial space.

By the way, this is also the primary reason you should always volunteer to draft the documents when you represent a client in a transaction. Don't think you are going to save your client time and money by letting the other lawyer produce the first draft. It is a lot more efficient to find a document that reflects your client's interests and fits the circumstances you are dealing with, and start with that. Revising a document that works for the other side and isn't really appropriate for what you are doing is a much more difficult and time consuming task.

C. Make Sure the Language in the Document is Consistent

After you have confirmed the precedent was drafted for a client whose interests are the same as your client, and it was used in the type of transaction you are involved in, step three is to decide whether you need or want to change the style, revise what's there or add anything more. And then make the changes so that the language is consistent throughout.

If you found a sample that is close to what you were looking for, but the document uses "shall" for obligations and you want to use "will," then make that change throughout and make sure you also use "will" in any provisions you add to the document. If don't want to make that change then leave the document alone, and make sure you also use "shall" when you add anything to the document.

If you had to piece the agreement together from precedent language in different documents, make sure the end result is internally consistent. If you took a provision from one document that referred to your client as "Buyer" and another document that used the term "Purchaser," pick one or the other and use that term consistently throughout the document. In other words, when you go to revise and finalize the document you have pieced together, make sure the language in the end result is consistent.

I started this book with a discussion of how to draft from scratch without using precedent language and documents because you really have to know that to use precedents well. There is nothing worse than a contract produced by an attorney that is a collection of provisions drafted in different styles for different clients in different circumstances, and has never been revised to make it consistent and appropriate for the transaction it is used in. When you see documents like that you will know the drafter has no idea what he is doing. If you do it right, there is more to drafting with precedent language and documents than just copying someone else's work.

Practice Exercises

Research online sources and find sample agreements and/or forms documents for the following type(s) of

contract(s) you drafted for the previous practice exercises: Employment Agreement, Purchase Agreement for Personal Property, Residential Lease Agreement, Sale of Assets Agreement and/or Consulting Agreement.

Compare the sample documents to the contact(s) you drafted in the exercises. Are there provisions that are missing from the samples or sections you could add to the document(s) you drafted from scratch? Are common sections drafted similarly or differently? What are the pros and cons using the language of the different provisions instead of the language you drafted?

9. TAILORING PRECEDENT DOCUMENTS FOR A DEAL

When you are practicing as a transactional lawyer and representing the same client in multiple similar transactions, like doing the leases for a client who manages shopping malls, you will already have the forms you need most of the time, so you won't have to go looking for precedents. Instead, your job will be to tailor the forms you have for use in specific deals. So, that is the subject of this chapter: tailoring form documents for a deal (i.e., adding to the document the factual information for the transaction and making appropriate revisions for the transaction).

For example, if you're working at a firm in the commercial lending department, you'll probably be working with a set of complex form documents the bank uses for all its commercial loans, or the firm uses whenever it represents a bank in a commercial loan. You won't have to draft the documents from

scratch. Instead, you'll need to tailor the forms to reflect the facts of a particular deal, and then close the transaction. And there is more too that than just filling in the blanks in the documents.

Working with complex form documents is very different than drafting agreements from scratch. If you aren't familiar with the form, you need to study it first, so you understand what it says and how it was put together. Draft the revisions the same way the rest of the document is drafted. Then read the document again to see if any other provisions are affected by the changes you made. And keep track of all the revised drafts you create.

A. Read the Form to Familiarize Yourself with the Substance and Structure

A lengthy business contract can be intimidating if you are not familiar with it. You may not know the subject matter; and the terminology may be alien to you. The type may be small and the paragraphs densely packed. Most people avoid reading contracts like that. But someone has to read them to figure out what they say. And that someone is you. So, just take your time and go through the document section by section. If there are terms you don't recognize, look them up. If the applicable law is something you are not familiar with, you may have to do a little research. Take breaks if you lose your concentration. The ability to scour a lengthy business document is a skill you will develop with time.

Depending upon the circumstances, you will likely want to take notes as you read; and it may help you to create an outline of the contract's terms. The situation is analogous to reading a long, complex statute for the first time. You really need to study the language to fully understand how the document works and how it was put together. You can't revise one

section and then be oblivious to what is contained in the rest of the form. So do what you have to do to familiarize yourself with the document before you start revising it.

B. Draft any Revisions the Same Way the Document was Drafted

When you are ready to start filling in the blanks and making revisions, there are three rules I would recommend you follow. First, draft the revisions the same way the rest of the document was drafted, *even if it was drafted differently than what you learned in the first few chapters of this book*. In other words, make whatever changes you have fit in with the rest of the document.

If you are adding a background provision, and the form starts each background provision with the word "whereas," then you should start your background provision the same way, even though "whereas" is legalese. If the form uses "shall" for obligations, you should use "shall" for obligations, even if you agree with me that "will" is plainer English than "shall." Also, use the document's definitions in the provisions you draft.

As a practical matter, you can't revamp every document from beginning to end to conform to what you learned in this book, and then send the client a bill for the time you spent doing something you weren't asked to do. You still need to be concerned with clarity, completion, and accuracy; but you also need to follow the same rules the original drafter followed when they drafted the document. Everyone drafts a little differently; when you are working on someone else's documents, you need to respect the decisions the drafter made and the style they felt was appropriate. So, draft the revisions the same way the document was drafted, even if it was drafted differently than what you learned so far.

C. Read Closely the Rest of the Document to See if Other Provisions are Affected

After you have revised a provision in a form document, read closely the rest of the provisions to see if they are affected. If they are, either confirm the provisions still work as intended with the new language or revise the provisions as well. The documents used in large commercial deals are often complicated; you have to appreciate that complexity and make sure your revisions don't screw up the rest of the form. So closely read the rest of the document whenever you add to, delete, or change the language that is already there.

If the document is set up for a corporation, for example, you are filling in the blanks, and it turns out the borrower is a sole proprietorship, then check to see if there are other provisions of the document that have to be changed as well. For example, the representation and warranty that "the Borrower is a duly organized and existing Florida corporation" will need to be revised. The obligation that "the Borrower will file annual reports with the Secretary of State" will have to be revised. And the prohibition that "the Borrower will not amend its articles of organization without the Lender's consent" will also need to be changed. None of that language applies if you change the borrower from a corporation to a sole proprietorship.

Don't rely only on the "search" command in the word processing software you use. If you search for "Massachusetts" that will help you find the references to that word in the document. But if there are places where the document uses the abbreviation "Mass." you will miss them if you just search for "Massachusetts." If the word is misspelled somewhere in the document, you will miss the misspelled word. Also, if there are references to the "Commonwealth" that need to be changed to the "State" (e.g., if you ware changing the form to refer to a

state instead of a commonwealth), you will miss those as well.

Any time you delete or revise a defined term you will need to read through the rest of the agreement to make that change does not have unintended consequences elsewhere in the agreement. Often, you will need to delete or revise other sections in the agreement to reflect the change.

When you delete an entire subsection in an agreement, realize that doing that will throw off the numbering of subsequent subsections. When you do that, either replace the deleted language with the statement "intentionally omitted" or renumber the entire section.

Also, if you renumber the entire section, make sure references to the renumbered paragraphs elsewhere in the document are also changed. You might have a provision that says a party can exercise its rights in "paragraph seven." If you deleted a paragraph, and paragraph seven is now paragraph six, you need to change the reference to paragraph seven as well.

Needless to say, it is difficult to pour through a long document over and over, every time you do a new deal, to make sure the substance matches what the client actually agreed to do, all the factual information is correct, and the language in the document is internally consistent. To make it easier, some practitioners print out the document and read it with pen in hand, rather than on a computer screen. Others read the contract slowly out loud to help them spot issues. I find it helps to look at one subject at a time, so I check all the paragraph numbering in one pass through, double check all the dates and dollar amounts in another pass through, check for name and address spelling, and then check for proper usage of defined terms. Another good habit to get into is going back to the notes of your original client conference to make sure you addressed all the issues (that's also a good practice for

completing a final exam in a contract drafting class). Complex documents tend to involve high dollar amounts. When a client entrusts you with handling a large transaction, there is really no such thing as being too careful.

D. Example of How to Revise a Complex Form Document

Let me give you an example to further demonstrate and explain what is involved in tailoring a complex agreement form for a specific type of deal. Take a look at the Construction Loan Agreement in the Appendix to this book. Let's walk through what is involved in making two simple changes to that document. The first change is to delete the "Commercial Lease." The form is written for the development of a property that has been leased to the borrower under a long-term commercial lease. To make the form work for a deal in which the borrower actually owns the property, we will need to delete the Commercial Lease from the form. Also, the form is drafted for a project in Massachusetts involving borrowers and guarantors organized under Massachusetts law. The second change is to make the document work for a project in Florida involving borrowers and guarantors organized under Florida law. What is involved in making those two simple changes to this complex agreement?

The first step is to find any reference to the "Commercial Lease" in the agreement. As it turns out, that term only appears once, in the definition of a "Leasehold Interest" in Section 1.3 of the Agreement:

> ~~"Leasehold Interest" means the leasehold interest of _____ in that portion of the Mortgaged Premises leased to _____ pursuant to the terms of that certain Commercial Lease, dated _____, between _____ and _____, as amended by that certain Amendment to Lease dated _____, and by that~~

> ~~certain Restated Amendment to Lease dated effective as of _____.~~

Of course, if you delete the reference to a Commercial Lease, then there is no longer any Leasehold Interest. So, if you delete the Commercial Lease, then you also need to delete the definition of a Leasehold Interest. And then, since the agreement no longer involves any Leasehold Interest, you also have to search through the document to find provisions referring to that term and modify them as appropriate.

If you start at the beginning of the document, the first time you will find the term Leasehold Interest used is in the list of instruments securing the loan in Section 1.6 where the "Leasehold Mortgage" is referred to.

> (b) ~~The Leasehold Mortgage, Security Agreement and Assignment of Leases and Rents (the "Leasehold Mortgage"), from the Borrower to the Bank dated of even date herewith, encumbering _____'s Leasehold Interest, and the personal property located thereon and used in connection therewith~~;

Of course, if you delete the reference to the Leasehold Interest, then there is no longer any Leasehold Mortgage, so this paragraph referring to and defining the Leasehold Mortgage also needs be deleted in its entirety. And since it is numbered, the deleted language should be referred to as "intentionally omitted," like this:

> (b) [Intentionally omitted.]

Having deleted these two terms from the agreement, the next step would be to search the document for references to either

or both of them, and modify the applicable provisions as appropriate. For example, at the end of Section 1.6 there is a reference to the Loan Documents as including, among other things, the Leasehold Mortgage. That reference should be deleted.

> This Agreement, the Note, the Fee Mortgage, ~~the Leasehold Mortgage,~~ the Assignment of Leases, the Assignment of Permits, the five Site Professional Consents, the Guaranties, the Financing Statements, the Environmental Indemnity Agreement, the Security Agreement and Assignment of Earnout Advance, the Blocked Account Agreement, and all other documents, instruments and agreements relating to and executed in connection with the Loan, as the same may be amended, restated, replaced, supplemented, extended, substituted, consolidated or otherwise modified from time to time, are collectively referred to as the "Loan Documents."

Similarly, references to the Leasehold Mortgage in Sections 3(g), 6.1(c), 10 and 19 should be deleted. And reference to the Leasehold Interest in Section 6.1(m) should be deleted as well.

The second step is to find and revise any references to the project being in Massachusetts and involving borrowers and guarantors organized under Massachusetts law. And that step is a little more difficult. Start by revising Massachusetts to Florida in the preamble:

> THIS CONSTRUCTION LOAN AGREEMENT (this "Agreement") is dated as of the ____ day of _____, by and among _____, a ~~Massachusetts~~ Florida limited liability company ("_____"), and _____, a ~~Massachusetts~~ Florida limited liability company ("_____"), both having a usual place of business at _____,

> _____, _____ ____ (collectively with their respective successors and assigns, the "Borrower"), _____, in his individual capacity, _____, a ~~Massachusetts~~ Florida limited liability company and _____, a ~~Massachusetts~~ Florida limited liability company all having an address at _____, _____, _____ _____ (collectively with their respective successors and assigns, the individual guarantor is hereinafter referred to as the "Individual Guarantor" and the remaining guarantors, the "LLC Guarantors"; together, the Individual Guarantor and the LLC Guarantors are hereinafter referred to collectively as the "Guarantors") and _____, having a usual place of business at _____, _____, _____ _____ (together with its successors and/or assigns, the "Bank").

Make the same substitution in Sections 5(o) and 6.1(r).

That is easy enough but in Sections like 3(a), you need to go a little further. References to the "Commonwealth of Massachusetts" need to be changed to the "State of Florida," since Massachusetts is a commonwealth and Florida is a state.

> (a) Each Borrower is a limited liability company duly organized and validly existing under the laws of the ~~Commonwealth of Massachusetts~~ State of Florida. Each of the LLC Guarantors is a limited liability company duly organized and validly existing under the laws of the ~~Commonwealth of Massachusetts~~ State of Florida

Sections 6.1(y), 6.1 (z) and 18 need to be revised similarly.

But then when you get to a section like 5(q) you need to go even further.

(q) Borrower agrees not to suffer any attachment (except for Notices of Contract under Mass. Gen. Laws Chapter 254 or Statements of Account thereunder, provided that (i) with respect to any such Notices of Contract or Statements of Account, the Borrower informs the Bank of the filing of the same upon Borrower's acquiring knowledge of same and (ii) with respect to any Statements of Account only, the Borrower bonds over such lien, provides an endorsement to the Title Policy issued by the Title Company insuring the priority of the Mortgage over such lien, or otherwise addresses the lien established thereby to the reasonable satisfaction of the Bank prior to the earlier of (a) twenty (20) days of Borrower's acquiring knowledge of the same, and (b) the date on which the lien attains priority over the lien of the Mortgage), whether by trustee process or otherwise, to be made against Borrower's interest in this Agreement or any payment hereunder. In addition, the Borrower further agrees not to assign or transfer this Agreement or any interest herein or right to payment hereunder (except for a Permitted Transfer as defined below) without the prior written consent of Bank, which Bank may give or withhold in its absolute discretion. Any such assignment or transfer made without Bank's consent shall be void and of no force or effect and shall at Bank's election be an immediate Event of Default hereunder.

The parenthetical after the reference to attachments refers to "Notices of Contract" under Massachusetts statute Mass. Gen. Laws Chapter 254. To revise that section, you need to do a little research. If Florida has a similar statute, then revise the language to track the statute and provide the appropriate citation to Florida statutes. If it doesn't, then it may be appropriate to either delete the parenthetical entirely or revise it in some other way to protect the client's interests.

Section 6.1(v) involves a similar issue:

(v) For the LLC Guarantors, (i) a certified copy of the Certificate of Organization for each LLC Guarantor issued by the Secretary of the ~~Commonwealth of Massachusetts~~ Florida, dated no more than thirty (30) days prior to the date hereof, and (ii) a Certificate of Legal Existence and Good Standing for each LLC Guarantor issued by the Secretary of the ~~Commonwealth of Massachusetts~~ Florida dated no more than thirty (30) days prior to the date hereof, and (iii) a Member's Certificate issued by the sole Member of each LLC Guarantor indicating the due authorization of the transactions contemplated by this Agreement.

Again, you need to do a little research. Are Certificates of Organization and Certificates of Legal Existence issued by the Secretary of the state of Florida or some other government official? Also, are they properly referred to in Florida as Certificates of Organization and Certificates of Legal Existence or is some other terminology used in Florida? To revise this section, you have to find the answers to those questions first, and then you will be able to change the language as appropriate.

These issues also arise in Section 20.

20. GOVERNING LAW. Each of the parties hereto agrees that this Agreement and all the Loan Documents were executed in ~~Massachusetts~~ Florida, and are governed by and construed according to the laws of The ~~Commonwealth of Massachusetts~~ State of Florida. Borrower hereby consents to the personal jurisdiction of The ~~Commonwealth of Massachusetts~~ State of Florida in connection with any action arising out of or in connection with the Loan, this

> Agreement and/or the other Loan Documents. The Bank's obligations under this Agreement and its obligations to make any advance or to make any future commitment is subject to Statutory Loan Limitations as set forth in Massachusetts General Laws Chapter 167E, Section 14. Consistent with said Statutory Loan Limitations, the Bank may refuse to fund the Loan or any advance, may require a principal reduction in an existing balance, and may sell participations, in any instance where a loan limit violation could occur.

As you can see, just making those two changes cannot be accomplished with two quick edits, and it is not as simple as just replacing those two terms throughout the document. Every time you change something in a complex form document like this you have to read closely the rest of the document to see if other provisions are affected, and then modify those provisions as appropriate.

D. Keep Track of Any Changes You Make

After you are done revising the document you are using, make sure to keep track of the changes you made. Always start with a copy of the original document and keep the original unedited document in your files. The changes you make for one deal may not be appropriate to use in another deal you work on in the future. If they aren't, it may make a lot more sense to go back to the original document and change that, than change the revised version again.

Once you have a set of documents drafted, and before you send them to the other side, send a set of drafts to your client to review. Make sure the changes are highlighted and the client can see what you did, especially the factual information you entered, and confirm it is accurate. You may have misheard something the client said, or the client may have misspoken.

Regardless of the reason, it is important to fix any mistakes before the documents go out the door.

Some clients will just skim what you send them, and then send it back with a thank you note (in fact some clients may think of the drafting as your job and not understand why you are seeking their input). Other clients will go through your edits with a fine-tooth comb and give you a lot of feedback. In my opinion the latter type is far preferable to work with. Just don't get defensive if you get a lot of comments. Better to incorporate those suggestions and make the agreement perfectly match what the client wants, than to go without them and have a document signed that doesn't accurately conform to the deal.

Once all the proofreading is done, provide the documents to the attorney on the other side of the transaction. In a commercial transaction, the attorney representing the other side will likely have additional proposed revisions. You will have responses to those revisions. And there may be other parties in the transaction who also want to revise the documents. As a result, it is important to keep track of all these changes, who made them, and when they were made. In the old days, that was done by keeping paper copies of each set of revisions in manila files. Today, it is more common to just keep copies of the computer files, labeled appropriately. For example, a file containing the borrower's first set of revisions to a loan agreement might have a filename like this: "loanagre.rev1.borr.2.28.2019.doc"

As for the proposed changes, they are usually done by marking up the original document. When paper was popular, an attorney would handwrite comments on a "hard copy" of the agreement and send it to the other side by "fax." Today, it is more common to use the "track changes" feature in a program like Word (You could also use comment bubbles or

even footnotes), and then send the comments to the other side by e-mail.

If you are the original producer of the document at issue, you have an interest in making sure all the requested revisions work together, and the document is still clear and coherent after it is revised. Sometimes when there are too many "cooks in the kitchen," the revisions can get out of hand, and the document suffers. If you are the original drafter, it is part of your job not to let that happen. After all the changes are in, you will likely have to go back through the document to make everything hang together more uniformly, and then circulate a revised draft.

Once you have the document in final form, save it in some way that it cannot be changed. If you are handling a closing, the other parties are relying on you to produce the final version of the document at the closing. As a practical matter there isn't enough time for every attorney to proofread every page of every document while everyone else is at the closing waiting to sign. So, everyone has to rely on you. And if you let them down by unintentionally substituting the wrong draft, your reputation will be irreparably harmed. So always keep careful track of which document is the final version!

Remember, completing a form document for a deal is not just an exercise in filling in the blanks. If it was, the client wouldn't be asking you to do it. Your job is to tailor the document to the deal. That involves closely reading the document and revising it with an appreciation of its complexity and how it was originally put together. So, use your brain, and think about whether the facts fit the substantive provisions. If they don't, make appropriate revisions to the language. And make the changes fit by following the same protocols the original drafter followed. That is how you complete a set of form documents for a deal.

Practice Exercise

Complete the Construction Loan Agreement in the Appendix of this book for the following deal:

The borrower is an individual named Alberto Salvatori. He lives at 333 South Street in Micanopy, Florida. The lender is Archer Bank, which has a branch office in Micanopy at 4 Sunrise Terrace. There are no guarantors.

The project will be a single-family home in Macintosh, Florida. The address is 7 Palm Court, Macintosh. The borrower plans to occupy the property after the closing.

The loan is for $150,000. There will be no retainage.

There are no junior lenders.

The lender approved Homes, Inc. as the contractor for the project. There is no architect. When the project is done, the contractor will certify compliance with applicable laws.

The borrower will be using part of the loan to acquire the property.

10. REVISING THE OTHER SIDE'S COMPLETED DOCUMENTS

The other situation you are often involved in if you have a transactional practice is proposing revisions to a completed document when you represent the other side in a deal (i.e., you are not the one who created the form or tailored the document for the deal). That usually involves qualifying the contract language, imposing conditions, and narrowing the scope of the original provisions. If your client is asked to sign a document you didn't draft, chances are very good you will need to go through this aspect of dealing with complex documents. And that is true even if the other side claims they are using a "standard" form and presents it to you like it's written in stone. (The one exception to this rule I am aware of is for the loan documents used by Fannie Mae. Those loans are securitized and sold in the secondary market. For that and other reasons, there is really nothing you can do to revise the language on behalf of a borrower. It is still important to explain to the borrower what the substance

of those documents is. But this discussion on revising a document to protect a client's interests really doesn't apply in that context.)

A. Qualify the Language in the Agreement

The primary way you protect the client's interests in documents you have not drafted yourself is by qualifying the language in the documents. For example, suppose there is an obligation in the document that says this:

The Manager will remove all lead paint from the interior of the Premises.

If you represent the owner of the premises, you could make that obligation stronger by changing it to this:

The Manager will remove all lead paint from the interior of the Premises to the satisfaction of the Owner.

If the owner drafted the language and you represented the manager, you could make the language weaker by revising it to this:

The Manager will use reasonable efforts to remove all lead paint from the interior of the Premises.

And if both parties were negotiating the language, they might agree on an objective standard that is somewhere in between those two extremes by revising it to say this:

The Manager will remove all lead paint from the interior of the Premises in a good and workmanlike manner.

Depending on who you represent, you can qualify the language to better serve your client's interests. By qualifying the language, you are changing the level of risk that each party has to bear. The first example puts all the risk on the manager. In the second example, the owner is taking more risk.

Another example might be the language used in representations and warranties. A seller in a real estate transaction might not be comfortable representing that "there are no hazardous wastes on the Property." The seller would know whether or not the seller dumped any hazardous wastes on the property. But the seller would have no way of knowing what happened before the seller owned the property. So, to better protect the seller's interests, the representation could be modified to say, "to the best of the Seller's knowledge, there are no hazardous wastes on the Property." By making that qualification, you transfer some of the risk from the seller to the buyer.

B. Impose Conditions on Rights, Obligations and Prohibitions

You can also change the allocation of risk in a document by imposing conditions on the exercise of rights by the other side, the imposition of obligations on your client, and the applicability of prohibitions that affect your client. Suppose, for example, an employer has the right to test an employee's blood for the presence of illegal drugs. The applicable provision might simply say this:

The Employer may obtain and test a sample of the Employee's blood to look for the presence of illegal drugs; and the Employee will submit to such tests when requested.

You could limit the employer's rights by imposing conditions on the language, like this:

After first giving the Employee written notice at least thirty (30) days before the proposed test date, the Employer may obtain and test a sample of the Employee's blood to look for the presence of illegal drugs; and the Employee will submit to such tests, unless the Employee has a valid medical reason for refusing to do so.

By imposing these conditions, you transfer some of the risk from the employee to the employer.

C. Narrow the Scope of Language in Rights, Obligations and Prohibitions

Yet another option is to narrow the scope of the language whenever the other side is given a right or your client is subject to an obligation or prohibition. This is particularly helpful when dealing with exculpatory provisions, which are often drafted in an unreasonably broad way. For example, here is a release from an apartment lease:

The Tenant releases, remises and forever discharges the Landlord, and the Landlord's employees and agents, from

any claims, causes of action or lawsuits the Tenant has now or may have in the future.

Ideally, you would just delete that provision, if you represent a tenant. But at the very least you can revise it to make the language narrower, like this:

The Tenant releases, remises and forever discharges the Landlord from any claims, causes of action or lawsuits arising out of the use of the Property the Tenant has now and is currently aware of.

When you are proposing changes like this, you should do the changes in a manner that shows the other attorney what you're proposing to revise; and makes it easy for the other attorney to accept your changes, if they are agreeable to making them. Don't just ask the attorney to revise a provision to address an issue you are concerned about. Make the revisions for her, so that they can just accept the change if they are agreeable. For example, if I were requesting a revision to the release provision above, I would do it like this:

The Tenant releases, remises and forever discharges the Landlord~~, and the Landlord's employees and agents,~~ from any claims, causes of action or lawsuits arising out of the use of the Property the Tenant has now ~~or may have in the future~~ and is currently aware of.

D. Change the Numbers; Ask to Receive More and Pay Less

Another way you can advance your client's interests in a document is to look for the numbers in the agreement, and determine whether it would be in your client's interest to propose changes in the amounts. But distinguish between the core consideration for the deal, which the client has already agreed to, and all the other numbers that the other party's lawyer added when he drafted the contract you are seeking to revise.

For example, if the client agreed to pay $1,000,000 for the property, that amount is probably not something you can revise. But if the attorney added a late fee of 12% per annum to any late payments, and that issue had not previously been discussed, then that is definitely something you should negotiate on your client's behalf.

If the agreement provides for other payments to be made by your client, then it is obviously in your client's interest to pay less. If you client is the one receiving the payments, then the opposite is true. If payments are to be made within some time period, then more time is better if you client is the one making the payments. Less time is better if your client is the one receiving the payments. If there is an interest rate applicable to past due amounts, the situation is analogous. Negotiate for a lower rate if your client will be obligated to pay it, and a higher rate if your client will be receiving the payments.

Also, if your client is agreeing to pay an undetermined amount, like expenses incurred by the other party, define those expenses narrowly to limit that liability. Also consider adding a cap or limit on what your client is agreeing to pay.

Those are just a few examples of the types of dollar amounts, time periods and other numbers you may find in an agreement

and can revise to better protect your client's interests. Put yourself in the client's shoes and imagine you are the one who is being requested to sign what the other lawyer drafted. If you wouldn't sign because the numbers are excessive or unfair, then raise those issues on your client's behalf.

E. Don't Think Industry Forms Are Written in Stone

There are times when documents are presented in a format that makes it look like they cannot be edited, but the reality is there is no reason why you can't change them. Examples of those types of documents are the listing agreement forms and real estate purchase and sale agreement forms that are drafted by trade associations in the real estate industry for use in residential real estate transactions. Those forms may be popular but there is nothing "standard" about them; they were drafted for the people the trade represents. Brokers represent sellers so most realtor generated forms are drafted primarily to represent sellers. If you represent a buyer, there will likely be some changes you will want to make.

So, if you get something like a listing agreement for a residential property in a computerized format that cannot easily be revised, one option you have is to print the document out and then hand write or type the edits on the hard copy before the document is signed. That would be very "old school." If the signing is being done online, another option is to add the changes as an addendum to the document, make sure the document incorporates the addendum by reference, and have the parties also sign the addendum. Here is an example:

Addendum to Limited Listing Agreement

Concerning 123 Black Acre, Alachua, FL

Notwithstanding anything to the contrary in the Listing Agreement (the Agreement) executed on _____ __, 20__ by and between Realty Corp. (the Broker) and Bob and Mary Smith (the Sellers) concerning the property located at 123 Black Acre, Alachua, Florida (the Property), the parties agree as follows:

The sales commission referred to in the Agreement will be due and payable if, as and when the sale of the Property to the Buyers closes and the deed to the Property is transferred to the Buyers, and not otherwise.

Executed as of this __ day of _____, 20__.

_____	_____
Bob Smith, Seller	**Realty Corp.** **By: [Name][Title]**
_____	
Mary Smith, Seller	

When the attorney representing the other side is responsible for drafting the documents, your job is not to just read through what the other attorney drafted and tell the client it is o.k. to sign. Your job is to participate in the drafting process by revising the documents to protect and/or advance your client's interests. Qualify the language, impose conditions, and limit the scope of provisions as appropriate. Follow the protocols in the agreement; and make it easy for the other side to see what you are asking for and make the requested change. If there is a disagreement over the language, then talk to the other lawyer and work it out. I have some advice on contract negotiations in the next chapter.

Practice Exercises

Propose revisions to the Construction Loan Agreement in the Appendix of this Handbook to better advance the borrower's interests in the transaction. For example,

Qualify appropriate representations "to the best of the Borrower's knowledge."

Obligate the lender to be reasonable in its requirements and the borrower to do work reasonably satisfactory to the Lender.

Consent should not be unreasonably withheld, conditioned or delayed, and costs should also be reasonable.

Revise overbroad language to make it narrower.

Appropriately condition the exercise of rights affecting the borrower.

11. NEGOTIATING CONTRACT PROVISIONS

Negotiating contract provisions is very different than negotiating something like the settlement of a case. For one thing, there are no dollar amounts to deal with. Also, the process is less adversarial. In litigation, if the settlement falls through, you just go back to fighting it out in court. If you are trying to document a transaction and the negotiations fall through, the transaction doesn't happen. That not only means both sides are upset at you and the other

lawyer; it also likely means neither of you get paid. Clients like deal makers, not deal killers. Plus, transactional lawyers often collect their fee from the proceeds of the transaction. So, you never want to let the deal fall through because you and the other lawyer couldn't figure out a reasonable way to document the terms. You need to be a good negotiator. Do what you need to get prepared before you start negotiating. Adopt a strategy for getting what you really want. And then resolve the issues and get the agreement done.

A. Meet with the Client

Before you start the negotiating make sure you are prepared. Meet with the client before you meet with the other attorney and find out two things. First, go through the terms of the deal and find out what is important to the client. What are the items the client must have for the deal to proceed; and what are the things the client can do without? In other words, what terms are not negotiable and what terms are flexible? As to the latter, what options are there? Is there a backup position the client could live with? What other options do you have if you can't get the client's first choice?

Second, find out how much bargaining power the client has. Who needs this deal more: your client or the other side? Who has a more substantial interest in the deal? If the deal is a finance transaction and your client is lending much less money than the other banks, then your client likely has much less leverage. What is the market like for the goods or services your client is providing? Is it a buyer's market or a seller's market? If your client is an employee and you are negotiating an employment agreement, is your client very valuable to the firm? Or is he lucky he got the job?

Meet with your client and at least find out those two things before you start negotiating. Don't make the mistake

of accomplishing something your client really doesn't need, while failing to get something your client must have. And don't go into a negotiation making a lot of demands and embarrass yourself by having to give in on everything because your client has no bargaining power. Iron those issues out before the process begins.

B. Develop a Strategy

After you have met with the client, take the time to come up with a strategy for the negotiations. Have a plan for how you want to proceed. Do you want to put some "throwaways" on the table, and then try to get what you want by giving up the "throwaways" in exchange for what you really want? Do you want to get the client involved and play "god cop; bad cop" with one of you as the good cop and the other as the bad cop? How about testing the water with some relatively unimportant provisions to find out how the other side negotiates, then move on to more important provisions? He may be a haggler, someone who likes to cut to the chase or someone who is obstinate in negotiations and refuses to change anything. Better to know which before you get to the important issues.

Also, make sure you have an explanation for each change you are requesting and a good argument for why it should be made. It may not be enough to just mark up a document, send it to the other side, and wait for a response. The other attorney may want to go through each revision and understand why you are requesting it. Regardless, you will also want to be ready with one or more back-up requests if you can't get your first choice. As an example, you might want to change the language to say the work will be done "to the satisfaction of" your client. But, as a back-up, you might also be willing to agree to having the work done to meet certain specific performance standards.

And find out who you will be dealing with before you start.

Google the lawyer on the other side and see what their background is. Maybe ask some associates who might know them what their style is. And do the same thing for the client on the other side. Anything you can find out about the parties could be helpful to you in negotiations. If you are going to deal with a bully, it is better to know that going in. If the lawyer has a reputation for being difficult but the client is a reasonable businessperson, suggest the lawyers and the clients meet together. Any information you can get about the participants may be helpful to ensure the negotiations are productive.

C. Negotiate with the Other Side

Once you are ready, try to do the negotiations on your own terms. Ideally, you would have the other attorney come to your office to talk about the revisions. But that may not be practicable. Likely, the other attorney wants you to come to their office. They don't want to drive all the way to the other side of town, and neither do you. Plus, both sides want to get through the process as efficiently as possible, so most negotiations end up happening over the phone.

If the negotiations are going to happen by telephone, make sure you are the one making the call. If the other attorney calls and catches you off guard, tell him you are busy with another project and will call back. Don't deal with the call if you aren't ready. Don't let the other side dictate when the negotiations happen.

Also, once the negotiations start, in addition to making your own presentation, listen carefully to how the other side has to say. If you can figure out where they have flexibility and where their hands are tied you will be better able to advance your client's interests, and you will be more successful at resolving any impasses you encounter. Try to figure out who the decision maker is on the other side. Is the attorney driving

the negotiations or just doing what the client tells him to do? Are the two of them working together or is one of them letting the other one deal with whatever it is you are proposing? If the negotiations are in person, watch closely for the other person's body language, micro expressions and reactions to the issues you raise during the negotiations. What you hear and see is at least as important as what you have to say.

Most importantly, never be a deal killer. Always be a deal maker. In complex transactions there are often multiple attorneys revising a document. Everyone has to advance their client's interests, but everyone also has to work together to get the deal done. You want to be assertive and persuasive about the changes you request. You don't want to meekly submit some comments and then not even follow up to find out if any were acceptable to the other side. But you never want to get the reputation for being a deal killer. Everyone has to get along for the deal to happen. So, when you are advocating for a particular revision, be sensitive to the other interests involved and look for ways to compromise.

Conduct your negotiations with the mindset that you are part of a team of professionals in charge of making the deal happen. There is seldom any harm done by opening your mouth and asking for a change in the language. If you represent a small player in a big project, you may need to choose your battles more carefully than you would otherwise. But you still need to say something, if for no other reason than to justify your existence. No one expects you to be a wallflower. Lawyers are not wallflowers. But you are also not a litigator concerned only with advocating your client's position. You need to be assertive, but you also need to compromise. You need to be an advocate, but you also need to be a deal maker, not a deal killer. If you are good at doing that, your services will always be in demand.

Practice Exercises

Pretend you represent the other side in the transaction involved in the Associate Employment Agreement, Laptop Purchase Agreement, Residential Lease Agreement, Sale of Assets Agreement and/or Consulting Services Agreement you drafted as the practice exercises for the previous chapters. Draft proposed revisions to the contract(s) you drafted, then give the original document to another student in your class, ask the student to represent the side you originally represented, and negotiate your proposed revisions with the student.

12. DEALING WITH ETHICAL ISSUES

Ethical issues are not easy to deal with in a transactional practice. Most of the ethical rules are for litigators not transactional attorneys, so there is often not much guidance. But there are still plenty of ethical pitfalls for transactional attorneys. And they are even more difficult to deal with when you are just starting out. If you commit malpractice you may lose your job, but professional liability insurance will likely cover the loss, assuming you have it. If you commit a violation of the rules of ethics, you could lose your license. So, the stakes are high!

Suppose you are working in a law firm, helping a senior partner close a loan. You send a draft loan agreement to borrower's counsel. Unknown to you, the document contains metadata showing the deletion of an "ipso facto" clause in a prior version. Borrower's counsel checks the metadata and requests the same change for their client's documents. The partner tells you to go ahead and delete the clause. The partner says the bank includes it because some borrowers don't realize it's unenforceable. Then they tell you to hurry up and get the loan closed. You are rushing when you print out the documents, and accidentally print out the original

unchanged version for the borrower to sign. After the closing, the senior partner catches the mistake and tells you to correct it by attaching the signature page to the revised version. The partner also sees you forgot to get the signature on the mortgage notarized. But you are able to correct that mistake as well; you take the document to a notary and have them notarize it after the fact. You then have the loan documents compiled and bound, and send them to the client with a letter explaining the substantive requirements in the documents. You aren't in the office when the letter is typed up, so you ask your paralegal to sign your name and send it out.

How many ethical issues do you see?

I'm sure every law student knows you can't defraud your own client or lie to the court. Among other things, attorneys are prohibited in the ethical rules from engaging "in conduct involving dishonesty, fraud, deceit, or misrepresentation…." *E.g.*, Florida Rules of Professional Conduct, Rule 4-8.4(c). But there are a lot of subtle ways you could find yourself doing something in connection with your drafting that could be considered dishonest.

Is it ethical, for example, to include in a contract a provision you know is unenforceable, like an "ipso facto" clause (entitling the lender to call the loan if the borrower files a bankruptcy petition), for the purpose of deceiving a party as to his rights? *E.g.*, Florida Rules of Professional Conduct, 4-1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent."); *See*, Alexandra Sickler, *Ethics in Contract Drafting*, 64 Gavel 10.

You probably know what metadata is (information attached to a document that is not visible on the face of the document); but you may not be in the habit of scrubbing the metadata

from your word documents before you provide them to the client or a third party? What if you circulate a set of loan documents you drafted and accidentally include in the metadata confidential information about the client? It is clear an attorney has an ethical obligation to keep client information confidential. *E.g.*, Florida Rules of Professional Conduct, 4-1.6(a). Are you in violation of the rule if you accidentally reveal that confidential information to a third party? *See e.g.*, Florida Rules of Professional Conduct, 4-1.6(e) ("A lawyer must make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client").

What if you fail to keep track of the final version of a document and accidentally arrange for the signing of an early draft at the closing? You are implicitly representing the document is the final version by producing it at the closing, but the misrepresentation is not intentional. Again, does it matter that you did it by accident? *See e.g.*, Florida Rules of Professional Conduct, Rule 4-1.1 (Attorneys must also "provide competent representation," which requires "the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.")

I think it's a clear ethical violation to have a client sign a blank signature page, and then substitute the document later. If the client signed a blank page and then you made it look like the client signed the document you attached, that is clearly deceitful. But what if you substitute one document for a revised version after the document is signed? Does it matter whether the client knows about the substitution, and consents to the new document's terms, or whether the changes are material, or only affect the rights of another party to the document? The client still didn't do what it has been made to look like the client did, right?

What if a senior attorney tells you to do it? Is that an excuse? "A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person." *E.g.*, Florida Rules of Professional Conduct, Rule 4-5.2(a). So, what would you do? Would you refuse? Or is there some better way of handling the situation?

It isn't unusual for parties to separately sign duplicate originals of a contract if they are in two different places when the closing occurs. And there is no problem with the closing attorney subsequently combining the signature pages to form one fully signed document. What is the difference between that situation and the one in the hypothetical?

If a client has already signed a document, can the attorney have it notarized after the fact? The notary's jurat usually states that the signer "subscribed before me." Subscribed means signed, so isn't the notary attesting to a misrepresentation if the signer didn't actually sign in front of the notary?

And finally, is it o.k. to have your paralegal sign your name to a cover letter? If the letter just says, "Enclosed please find copies of the documents," that's one thing. But the paralegal's identity and nonlawyer status should still be disclosed. If the letter discusses the substantive content of the documents, that's likely different. Among other things, a lawyer may be aiding in the unauthorized practice of law by allowing a nonlawyer to sign a letter containing legal advice. *See*, Florida Rules of Professional Conduct, 4-5.5(b)(2) (A nonlawyer may not "hold out to the public or otherwise represent that the lawyer is admitted to practice in Florida.").

Even more important than the issue of whether common occurrences like these constitute ethical violations is the issue of how to handle them should they arise. You may have

noticed most of these issues are the result of someone making a mistake and then looking for a quick, easy way to fix it. Mistakes happen. Everyone makes mistakes from time to time. That isn't the problem. The problem is how you handle the mistakes when they occur. To avoid violating the rules of ethics, I would recommend that you follow these three steps.

First, figure out how to properly correct whatever went wrong. Probably you are going to have to re-do whatever you did. If the problem happened in connection with a closing, that usually means having the document signed again.

Second, be up front about what happened. Don't try to cover it up. When you tell the affected party what happened also tell them how you are going to fix it. Don't just "drop a bomb" on someone's lap and then leave them to figure out what to do.

Third, correct the mistake on your own time and at your own expense (don't bill the client for the time you spend correcting your own error). And fix the problem in a way that is as little of an inconvenience as possible to your client and/or your employer. So, if you need a page initialed, bring the document to the client's place of business; don't ask them to take time off from work and come into your office to get that done.

I remember my ethics professor in law school saying "Your license is your ticket to practice law. Whatever you do, don't do anything that could put your ticket in jeopardy." Unfortunately, when you are really busy and under a lot of stress, there are shortcuts you might be tempted to take that might seem perfectly innocent at the time. But later, with 20/20 hindsight, what you did might also be characterized as inappropriate. Despite the rush of activity, you still have to pay close attention and stay on top of what you are doing to avoid ending up on the wrong side of an ethics complaint.

Practice Exercises

Scrub the metadata from the Associate Employment Agreement, Laptop Purchase Agreement, Residential Lease Agreement, Sale of Assets Agreement and/or Consulting Services Agreement you drafted as the practice exercises for the previous chapters.

13. GETTING THE CONTRACT SIGNED (CLOSING THE DEAL)

I've been hired to draft a lot of documents, but I don't think there has ever been a time when my job wasn't also to get the documents signed and the deal done. Sometimes you just need a signature, but more often there is money to collect as well. If the signer is signing for an entity, you should always get some verification of the signer's authority. If the deal is complex enough, that will be just part of the closing agenda and due diligence process that precedes the actual signing of the documents. And if all goes well, don't forget to follow up with the client and make sure the door is open for them to refer more work your way.

A. Get the Documents Signed and Collect the Money

The last step in drafting, just like the first step (getting up to speed) has little to do with drafting itself. It is diligently following up and getting the deal closed. You would be surprised how many times a project "falls through the cracks," especially when you are busy, and your attention is called to other bigger and better things.

And it isn't just the signing you have to get done. If the agreement involves a deposit that is supposed to be collected at closing, your job is to get the money and make sure it goes where it is supposed to go. If you don't do that, there could be hell to pay. If there is a breach by one of the parties later on, and the other party's remedy is to keep the deposit, that party isn't going to be happy to find out you never got it.

B. Verify Authority to Sign for an Entity

If one of the persons signing the documents is signing on behalf of an entity, there are a number of things you need to confirm to make sure the signature will be binding on the entity. Make sure the person is who he says he is by asking to see their driver's license. And consider having them swear or affirm that they are signing voluntarily by having their signature notarized.

In addition, review the state statutes for the type of entity involved to confirm that the entity has the power to enter into the agreement, and to determine who has the authority to enter into the agreement on behalf of the entity. For example, in Florida, the powers of a corporation are enumerated in § 607.0392, Fla. Stat.; and the authority to exercise those powers is given to the directors of the corporation in § 607.0801, Fla. Stat.

Then look at the entity's organizational documents (e.g., for a corporation, the articles and bylaws) to analyze the same issues (i.e., make sure the transaction is not "ultra vires" or beyond the corporation's powers and the signer has been properly authorized by the directors). Usually, the purposes of the corporation are set forth at the beginning of the articles of organization; and power of the directors to manage the corporation is set forth in the bylaws. Also, the bylaws will typically state that third parties may rely on a certificate of

the clerk as to the authority of someone else to enter into the transaction and sign the documents, like this:

> 5.5 Evidence of Authority. A certificate by the Clerk or Secretary, as to any action taken by the stockholders, Directors, any committee or any officer or representative of the corporation shall as to all persons who rely on the certificate in good faith be conclusive evidence of such action.

Relying on a provision like that in the bylaws, you would require the entity entering into the agreement to produce a clerk's certificate and resolutions evidencing the signer's authority. The clerk's certificate identifies the signer and the signer's title, and authenticates the attached resolutions which confirm the signer is authorized to sign on behalf of the entity. Here is an example for a corporation:

> **SECRETARY'S CERTIFICATE**
>
> **The undersigned, on behalf of Cigars for Everyone, Inc., a Florida corporation (the "Corporation") and not individually, certifies that:**
>
> **1. Attached to this certificate as Exhibit A is a true, correct and complete copy of the Action of Directors at a Meeting of the Directors of the Corporation, duly adopted by the Directors on April 12, 2020, which Action has not been revoked, modified, amended, or rescinded and is in full force and effect as of the date of this certificate (the "Action").**
>
> **2. The Corporation is a non-profit corporation legally existing and in good standing under the laws of the State of**

Florida, as of the date of this certificate, and has the power, authority and legal right to enter into, and to execute, deliver, and perform, the obligations under the documents listed in the Action.

3. The following persons have been duly elected and qualified, and on the date hereof are officers of the Corporation, holding the respective offices set opposite their names:

Name	Title
Sam Zapata	President
Eileen Zapata	Secretary

The undersigned, has, on behalf of the Corporation, executed this certificate on this 22nd day of April, 2020.

_____

Eileen Zapata, Secretary

Exhibit A

ACTIONS OF DIRECTORS BY WRITTEN CONSENT

CIGARS FOR EVERYONE, INC.

MEETING: April 12, 2020

Pursuant to the Articles of Organization and By-Laws of Cigars for Everyone, Inc., a Florida corporation (the "Corporation"), the Directors of the Corporation do adopt the following resolutions and agree to the taking of the actions set forth below:

RESOLVED: That the Corporation is empowered, authorized, and directed to take all action and execute and deliver any documents necessary or proper to direct, complete, carry out, consummate and effectuate the transfer, conveyance, or sale of the project located on the property at 101 University Avenue, Gainesville, Florida (the "Property").

RESOLVED: That the President of the Corporation, Sam Zapata, be, and is, empowered, authorized, and directed in the name of and on behalf of the Corporation to take all action and execute and deliver any documents necessary or proper to direct, complete, carry out, consummate, and effectuate the transfer, conveyance or sale of the Property to the University of Florida, including, without limitation, a quitclaim deed of the Property from the Corporation to the University of Florida, a Settlement Statement, 1099 Form and Property Owner's Affidavit.

If the transaction involves a loan in a substantial amount it may also be appropriate to request an opinion from borrower's counsel that the signer is authorized, and the loan documents are enforceable against the entity. If there is a mortgage involved, it may be appropriate to go a step further and request insurance from a title company that the mortgage creates an enforceable lien on the property, and the lien has the required priority over other liens. The issue of whether a signer for an entity is properly authorized is central to any closing, but for very large and complex deals, it is also just the tip of the iceberg.

C. Create a Closing Agenda

If the deal is something like a commercial loan for the construction of a multi-unit building, then the process will likely involve the creation of a closing agenda or checklist, which is a list of due diligence items that need to be produced, reviewed, and approved before the documents are actually signed and the deal closed. Here is an example of a short closing checklist:

Closing Checklist

A $1,000,000.00 Mortgage loan from Fictitious Bank (Lender) to Borrower Corporation (Borrower). Items marked B are to be submitted by the Borrower. Items marked L are the responsibility of Lender.

A. Organization and Authority of Borrower

1. Articles of Organization, and amendments B
2. Bylaws, and any amendments B
3. Current Legal Existence / Good Standing Certificate B
4. Evidence of Authority for Transactions (Clerk's Certificate) B

B. Loan Documents

1. $1,000,000.00 Promissory Note L
2. Mortgage and Security Agreement L
3. Loan Agreement with all exhibits attached L
4. UCC Financing Statements L

C. Title Insurance Matters

1. Copy of Title Insurance Commitment provided to Lender B
2. Title Exception Documents B

D. Legal Opinions

1. Opinion of Borrower's Counsel as to execution, delivery, validity and enforceability of Loan Documents B
2. Opinion of Borrower's Counsel as to compliance with building, zoning, and subdivision laws and regulations B

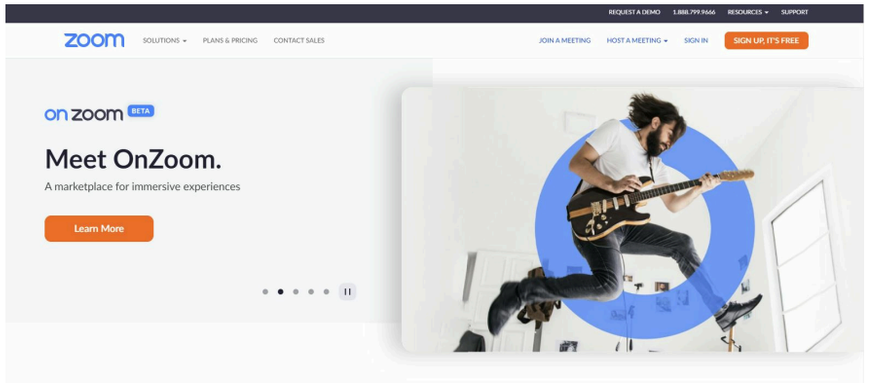
E. Other Documents

1. Copy of Building Permit B
2. Environmental Site Assessment B
3. Project Development Budget B
4. Contract with General Contractor B
5. Subcontracts

The agenda also helps to keep everyone focused and on track in a large commercial project involving a lot of attorneys. Using e-mail helps keep people in the loop too. At the beginning of every closing I handled, one of the first things I did was get everyone's e-mail address. E-mail is an effective way to keep everyone in the loop and deliver copies of documents, drafts, and other closing materials.

I used to also participate in periodic conference calls for the closings I was involved in. If I were doing closings today, I'd do the conferences online with a service like *Zoom, Uberconference* or *Skype*. The advantage of an online conference is that you can put a document on the screen during the conference so

everyone else can see it. You can revise the document in real time as various modifications are discussed. And you can keep a recording of what was said and done by the parties and their attorneys while the conference took place, assuming everyone consents to being recorded.



D. Follow Up After the Closing

After the deal is done, it is usually counsel's responsibility to distribute to the parties either the original, signed documents or copies of the signed documents. In the old days, attorneys would distribute a closing "bible" containing all the relevant documents. Today you will most likely send out a CD containing pdfs of the same documents. When you send that package out to the client, I would also recommend sending the client a cover letter highlighting any deadlines or other important provisions in the agreement the client will need to remember. Put together a nice organized package so the client can see what they paid for and thank them for the opportunity to be of service. The end of every transaction, assuming all went well, is a good time to continue developing your relationship with the client.

Law is a service industry. You can't save the world if the world

does not want to hire you to do the work. In the same way that you should always look for opportunities to add value to a deal, you should also be on the lookout for opportunities to further develop your relationships with clients. As long as you have clients, you will never have trouble finding a job.

Practice Exercises

Draft the following document(s) for the Associate Employment Agreement, Laptop Purchase Agreement, Residential Lease Agreement, Sale of Assets Agreement and/or Consulting Services Agreement you drafted as the practice exercises for the previous chapters.

1. A Partner's Certificate and Vote for Big Law LLP (Michael Lynch, Partner, will be signing for Big Law).

2. A Clerk's Certificate and Resolutions for Apple, Inc. (Karen Brooks, Senior Vice President, will be signing for Apple).

3. A Clerk's Certificate and Vote for University Housing Corp. (Kent Rosenbury, Director of Housing Services, will be signing for University Housing).

4. A Manager's Certificate for Coffee Castle LLC (Elizabeth Brooks, Manager, will be signing for Coffee Castle).

5. A Clerk's Certificate and Vote for AutoDocs Consulting Corp. (Frank Rodriguez, Treasurer, will be signing for AutoDocs Consulting Corp.).

14. DRAFTING WITH AI AND DOCUMENT ASSEMBLY PROGRAMS

Today we are transitioning from a period when paper was king to a digital age when everything is recorded in computer files. When personal computers first became popular, attorneys used them to replace a typewriter and a filing cabinet. But now more and more of the actual drafting of documents is being done by computer. You don't need to train yourself to work with every type of software, but you do need to know what types of programs are out there and when they would be of use. Beverly Rich, How AI is Changing Contracts, Harvard Business Review (2018).

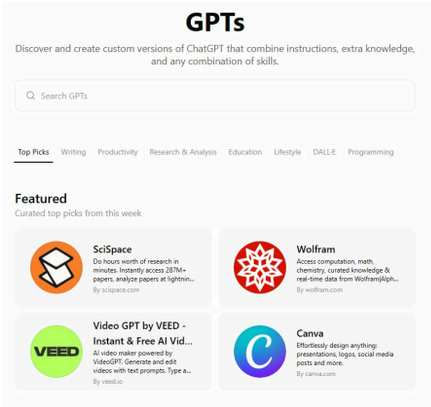
When I first started doing transactional work, it was common practice for the closing attorney to deliver to the parties a "closing binder" after the transaction was completed. The closing binder consisted of copies of all the documents and a table of contents (a revised version of the closing agenda), nicely "velo" bound together. Later the practice changed to

providing the same content on a computer disc (cd). CD's save a lot of paper and space, but there are also disadvantages to storing documents in digital form. CD's replaced floppy disks which are now extinct. And CD's are being replaced more and more by flash drives, so CD's may soon be extinct as well. I have old files on my computer that I can no longer open because they were drafted with software that is no longer in use. Say what you want about paper and other primitive forms of storing information, but there are cave paintings made by Neanderthals 64,000 years ago that you can still read.

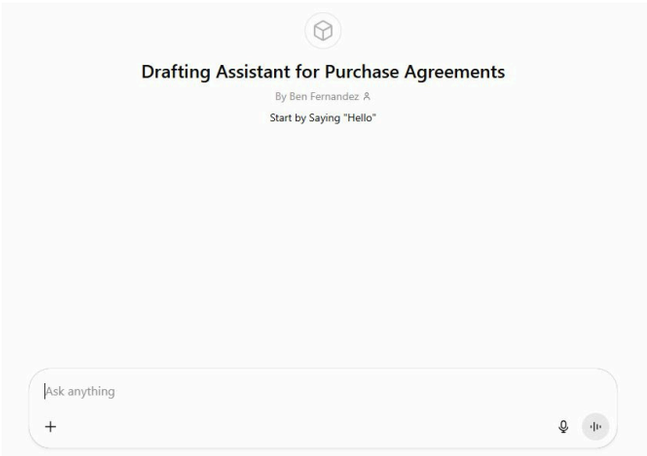
A. Drafting from Scratch with Artificial Intelligence Services

Today, computers are not only used to store documents, computers are also used to draft documents. For example, Artificial Intelligence services like ChatGPT can be used to draft an agreement from scratch. If the agreement is very simple and drafted for a layperson, using ChatGPT can be effective. All the user has to do is input the terms of the deal and ask the service to draft the desired type of agreement.

However, if the user is an attorney or law student attempting to apply what is taught in a textbook on drafting (or this book), the process is a little more complicated. What is needed is the service ChatGPT offers for a monthly fee called "GPT's" (other AI platforms offer similar services under different names).



What a custom GPT does is allow the user to create their own custom GPT by uploading specific drafting conventions (e.g., use "will" or "shall" for covenants) and sample documents drafted in the desired style. Once the custom GPT is created, the user can then input the terms of the deal, and ask the service to draft the contract following the previously uploaded conventions and using the sample documents as examples. The end result is a GPT set up to draft contracts the way the attorney desires them to be drafted (or the way a law student is taught to draft them in a textbook), like this:



B. Drafting with Precedents and Document Assembly Programs

Computers area also used to draft with precedents. One type of program is basically a form filler. The user inputs factual information and the program inserts that information into appropriate blanks in form documents. To use that type of program you would first create a template for a document. Here is an example of what a template for a short form mortgage might look like:

MORTGAGE

<<Borrower's Name>> of <<Borrower's Street Address>>, <<Borrower's County>> County, <<Borrower's State>>, for consideration paid, grants to <<Lender's Name >>of <<Lender's Street Address>>,<<Lender's County>> County, <<Lender's State>>, with MORTGAGE COVENANTS, to secure the payment of <<Amount of Loan in Words>> dollars in <<Term of Loan in Years>> years with <<Interest Rate in Percent>> per cent interest per annum, payable in <<Number of Installments>> installments, as provided in a promissory note of even date, the land together with the buildings thereon in <<Address of Mortgaged Property>>, <<County of Mortgaged Property>> County, <<State of Mortgaged Property>> more particularly described as follows:

<<Property Description>>

This Mortgage is upon the STATUTORY CONDITION, for any breach of which Mortgagee shall have the STATUTORY POWER OF SALE.

This Mortgage is executed under seal this ___ day of _____, ____.

Mortgagor

_____

<<Borrower's Name>>

COMMONWEALTH OF MASSACHUSETTS

<<County of Mortgaged Property>>

On this ____ day of _____, ____, before me, personally appeared <<Borrower's Name>>, who proved to me through satisfactory evidence of identification, which was _____, to be the persons whose name is signed on the preceding document, and acknowledged to me that they signed it voluntarily for its stated purpose.

_____

_____

Notary Public

My commission expires:

You would next create an input screen you would use to enter the information the software needs to fill out the document. That might look like this:

Input Form for Mortgage

What is the borrower's name? _____

What is the borrower street address?

Street: _____

County: _____

State: _____

What is the lender's name? _____

What is the lender's address?

Street: _____

County: _____

State: _____

What is the amount of the loan in words? _____ dollars

What is the term of the loan? _____ years

What is the interest rate? _____ percent

How many installments will there be? _____

What is the address of the mortgaged property?

Street: _____

County: _____

State: _____

What is the legal description of the property?

_____
_____
_____
_____
__

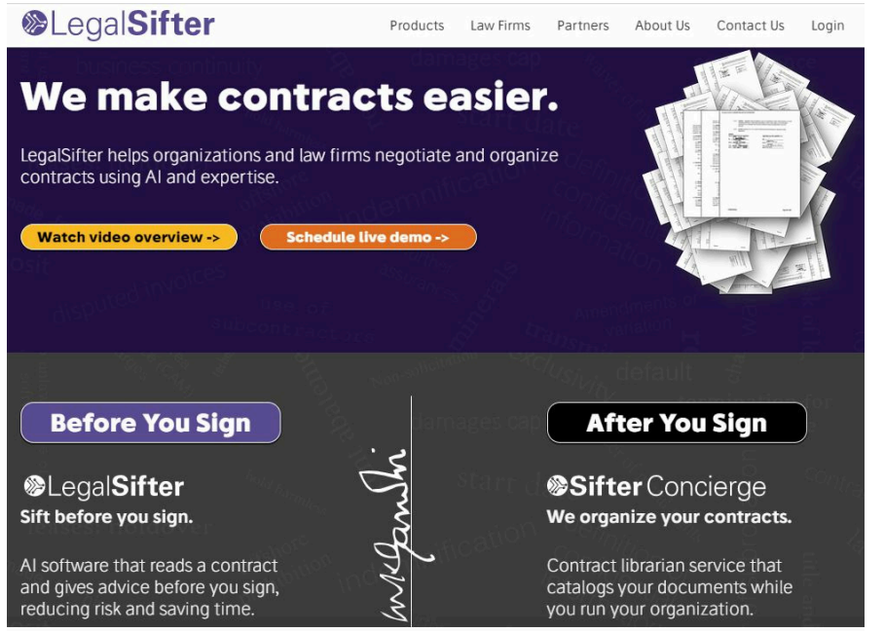
Then you would enter the information into the input screen and the software would produce a draft of the document based on the template.

Obviously you wouldn't go through all this trouble for just one short document. You would use a program like this if you are repeatedly using the same lengthy form documents for specific types of transactions. For example, if your job is to conduct commercial loan closings for an institutional client of the firm, and the client uses the same forms for each transaction, then using a program like this to produce an initial draft of documents for a deal would likely make the process much more efficient.

In addition, there are other programs you could use that are more sophisticated. For example, there are programs that will not only fill in the blanks, but also decide what types of provisions to use depending upon what the facts are. So, the software might ask whether the loan is to be a recourse loan or a nonrecourse loan. Depending upon the answer, the software will insert the provisions applicable to a recourse loan or the provisions applicable to a nonrecourse loan, and then fill in the blanks in those provisions. The software might also ask for the identity of the borrower. If the borrower is a partnership, then the program will add provisions appropriate for a partnership. If the borrower is a corporation, the program will add provisions appropriate for a corporation.

Banks use this kind of software to generate residential loan documents with the usual Fannie Mae forms. Brokers use this type of software to generate purchase and sale agreements and other simple documents for use in residential real estate transactions. Similar programs are available to consumers. Nolo sells a popular program called *WillMaker* that will walk a non-lawyer through the process of drafting a last will and testament. *Rocket Lawyer, LegalZoom* and *Law Depot* are online services that help consumers and small businesses draft simple legal documents. Programs like *HotDocs, XpressDox, Contract Express* and *NetDocuments* help lawyers to produce a first draft of more complex documents. Also, some programs

interface with e-mail, filing and calendaring software, as well as client websites. And programs like *LegalSifter* and *LawGeex* use artificial intelligence to help attorneys review existing contracts. If I were in law school today, I would consider learning how to use that type of software and adding my proficiency with it to my resume.



Does all this mean we don't need lawyers? No. These programs make the process more efficient, but they don't eliminate the need for good lawyers. You should be aware of them because, as a practical matter, you have to be able to do better than they can. If the client can go online and print out a document that is just as good as the one you drafted, then the client no longer needs your services. It is more convenient, less expensive and less time-consuming to have a computer draft a document than to meet with an attorney and wait for the attorney to send you a draft (and a bill). As a result, the product the

attorney produces must always be better than any computer can do.

B. Closing with Online Resources

It also used to be that documents were executed in a closing in an attorney's office, but that is changing too. More and more documents are executed online with electronic signatures. For example, programs called *DocuSign, DotLoop* and *HelloSign* enable attorneys to have some real estate documents signed online. And some programs also facilitate the exchange of document drafts and collaboration by attorneys.

Electronic signatures are governed by two statutes. The federal Electronic Signatures in Global and National Commerce Act 15 U.S.C. §§7001-7031 declares that "a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form…." §7001(a)(1). The Uniform Electronic Transactions Act, a uniform state law, similarly declares the validity and enforceability of electronic signatures. In Florida, the law specifically provides as follows:

> LEGAL RECOGNITION OF ELECTRONIC RECORDS, ELECTRONIC SIGNATURES, AND ELECTRONIC CONTRACTS. —
>
> (a) A record or signature may not be denied legal effect or enforceability solely because the record or signature is in electronic form.
> (b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in the formation of the contract.
> (c) If a provision of law requires a record to be in writing, an electronic record satisfies such provision.
> (d) If a provision of law requires a signature, an electronic signature satisfies such provision.
>
> Fla. Stat. §668.50(7).

Someday we may find ourselves relying on a retinal scan or some other biometric measure to show that an agreement was made. Suraiya Jabin & Farhana Zareen, *Biometric Signature Verification*, International Journal of Biometrics (January 2015). For now, it is often still necessary that a deed be signed in person, on paper, and in the presence of a notary for a real estate closing to occur. And banks still typically insist that their loan documents be signed in person. So, attorneys still conduct closings in person, although they may happen less often.

C. Smart Contracts

In addition to contracts being drafted by computer programs and agreements being signed online, contracts are also being performed by computers online as well. An example of that is a so called "smart contract."

A smart contract is a computer program that is part of a block chain. The block chain is a series of connected programs that allow users to transfer payments on line without an intermediary. A smart contract works by following one or more "if/ then…" statements that are written into the program. The purpose of a smart contract is to provide a mechanism for transactions to occur, like a transfer of digital currency, or an exchange of digital currency for a digital asset, when certain conditions are met and without the need for a third party. The Etherium block chain is the most popular block chain for smart contracts; the programming language most commonly used for smart contracts is Solidity.

"Crowdfunding" is an example of a smart contract used to transfer digital currency. The contract initially serves to secure funds from investors for a project. If a predetermined

level of investment is reached, the contract automatically transfers the funds to the creators for the project. If the level of investment is not reached, the funds are returned to the investors.

OpenSea.com is another example of smart contract technology. On that platform consumers and content creators can buy and sell various Non-Fungible Tokens (digital assets) like music and photography. The NFT's are paid for with digital currencies in a buyer's virtual wallet (MetaMask, Coinbase Wallet, TrustWallet, etc.)

There are two types of smart contracts: deterministic and non-deterministic. A deterministic smart contract gets the information it needs to execute a transaction from the block chain. A non-deterministic smart contract requires information outside the block chain to operate. Non-deterministic contracts require the involvement of an oracle, which creates a link between the contract and the real world. The purpose of an oracle is to retrieve and verify external information for a smart contract. An example would be market data from an external feed.
You could think of a purchase and sale agreement as a transaction subject to a series of conditions. The primary condition for delivery of the subject matter is the purchase price. Real estate and goods are not digital assets, but the transfer of ownership could be memorialized in a deed or bill of sale, and either of those documents could be converted to digital form. The real problem, however, is that many of the conditions to a typical purchase and sale arrangement are external to the block chain and would have to be retrieved and verified not by an oracle but either by the parties themselves or by one or more third parties involved in the transaction. Until that problem is solved, smart contracts will primarily serve as a mechanism for making payments with digital currencies, and buying and selling NFT's.

Attorneys are using technology more and more, just like everyone else. But in the most important respects, the attorney's role remains unchanged. When you represent a client, the client is not paying you to obtain a form document or fill in the blanks and print one out, and then witness your signature. The client is paying you to think. It is important that you have the skill to express the client's agreement in a clear, complete, and accurate manner. But substance is what matters most. And that means using the knowledge and training you began to acquire in law school and continued to build on in practice to advance the client's goals and protect the client's interests. Computers may make the process more efficient. But until the day comes when a computer can go through law school and think like a lawyer, there will always be a need for the minds of people like us. There will always be a place for smart, knowledgeable lawyers who draft well.

Practice Exercises

Create a sample template and input form for the Associate Employment Agreement, Laptop Purchase Agreement, Residential Lease Agreement, Sale of Assets Agreement and/or Consulting Services Agreement you drafted as the practice exercises for the previous chapters.

15. DRAFTING A CONTRACT AMENDMENT

There is one more skill that I think is important to know if you are going to practice in this area, and that is how to draft a contract amendment. For a variety of reasons, you may need to go back and change something in a contract you have already drafted. One party or the other may have changed their practices. Something about the way the deal was originally planned may not be working as well as it could. Or the parties may want to expand what they had originally contemplated doing. When this happens, drafting a new agreement may be an option. But often the preferred method is to leave what already exists in place and just provide for the new terms. If you need to draft a contract amendment, here is a quick outline of how to do it.

The first thing you need to think about when drafting an amendment is whether it is better to amend the document or just start over with a new agreement. The one big advantage of amending is it doesn't give the other party an opportunity to renegotiate any of the provisions that aren't changing. But there are other legal issues to consider as well. If the document

is a security instrument, the client may lose the priority of their interest by starting over. So, it may be better to amend. If the document is a negotiable instrument, amending may destroy the negotiability of the instrument. So, it may be better to start over and re-do the original document. Consider those issues first. If an amendment makes sense, then start drafting.

Start off with a title and exordium, referring to the original agreement, like this:

AMENDMENT TO APARTMENT LEASE

This Amendment to Apartment Lease (Amendment) dated January 25, 2019, is by and between South Tower Management Corp., a Florida Corporation having an office at 123 Main Street in Jacksonville, Florida (Landlord) and William Lancaster III, an individual having a residence at 23 Beach Avenue, Apt. 567, Jacksonville Beach, Florida (Tenant). The parties mutually agree as follows:

Then draft a background section explaining what happened and why the parties are amending the original document.

1. <u>Background of Amendment</u>

A. On January 2, 2015 Landlord and Tenant entered into an apartment lease for the property located at 31 West Street, Unit 310, Gainesville, Florida (the Lease).

B. The Lease was for a term of four (4) years beginning on January 2, 2015 and ending on January 1, 2019; and the monthly rent provided for in the Lease was $1,500 per month.

C. The Tenant now desires to extend the term of the Lease; and the Landlord is willing to extend the term at a higher rental rate.

Accordingly, the parties mutually agree as follows:

If you want to use the defined terms in the original lease, then consider adding a statement like this: "Capitalized terms not otherwise defined in this Amendment have the same meanings as provided in the Lease."

After you have completed the background section, explain what each change is, as though you are editing the original document. In other words, reference the section to change, delete the old language, and insert the new language, like this:

2. Changes to Lease

A. Section 3 of the Lease (Term of Rental) is deleted and replaced with the following:

"3. <u>Term of Rental</u>

The term of the rental is for four (4) years beginning on January 2, 2019 and ending on January 1, 2023."

B. Section 4(a) of the Lease (Payment of Rent) is deleted and replaced with the following:

"(a) <u>Payment of Rent</u>

On or before the first day of each month, the Tenant will pay the Landlord rent in the amount of two thousand

dollars ($2,000) per month."

Once you have made all the changes, finish with a reiteration of the rest of the contract, a testimonium, and signature lines.

3. Remainder of Lease

All other terms and conditions of the Lease remain in full force and effect.

Executed by the parties as of the date above.

Landlord	**Tenant**
_____	_____
South Tower Mgmt Corp.	**William Lancaster III**
By: [Name] [Title]	

Now you know how to draft a contract from scratch, revise a form document, negotiate terms, and close a deal. And you also know how to amend a contract after the deal is done. That is pretty much everything you need to know to start drafting contracts and practicing as a transactional lawyer.

Keep learning as much as you can and seek perfection in everything you write. Good luck!

Practice Exercises

Draft an amendment to the Associate Employment Agreement, Laptop Purchase Agreement, Residential Lease Agreement, Sale of Assets Agreement and/or Consulting Services Agreement you drafted as the practice exercises for the previous chapters providing as follows:

1. Draft an Amendment to the Associate Employment Agreement changing the salary to $180,000, increasing the billable hours requirement to 2,000 hours per year, and deleting the fidelity provision.

2. Draft an Amendment to the Laptop Purchase Agreement changing the price to $900 per laptop, making the additional changes that flow from that change, and deleting the late fee provision.

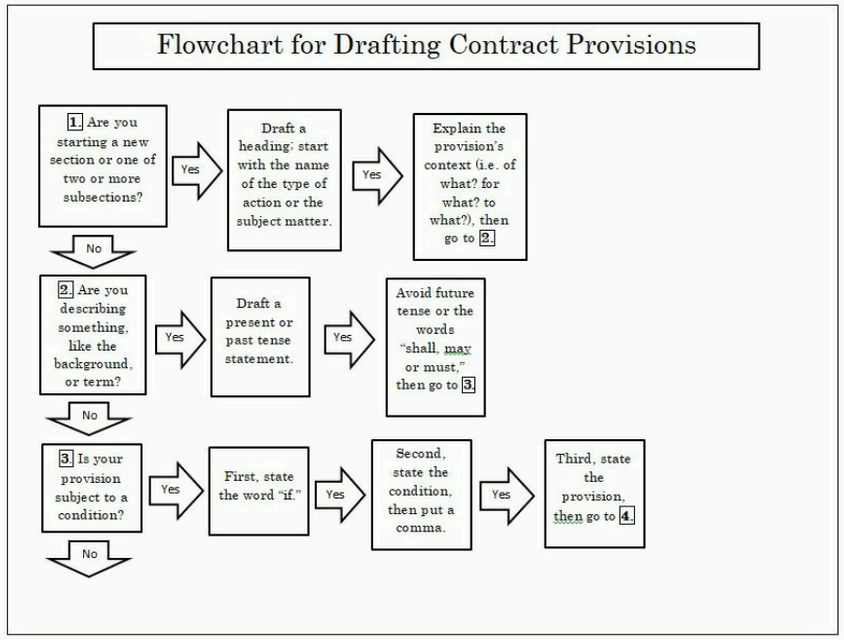
3. Draft an Amendment to the Residential Lease Agreement changing the rent to $1,200 per month, extending the term to 12 months, and deleting the time is of the essence provision.

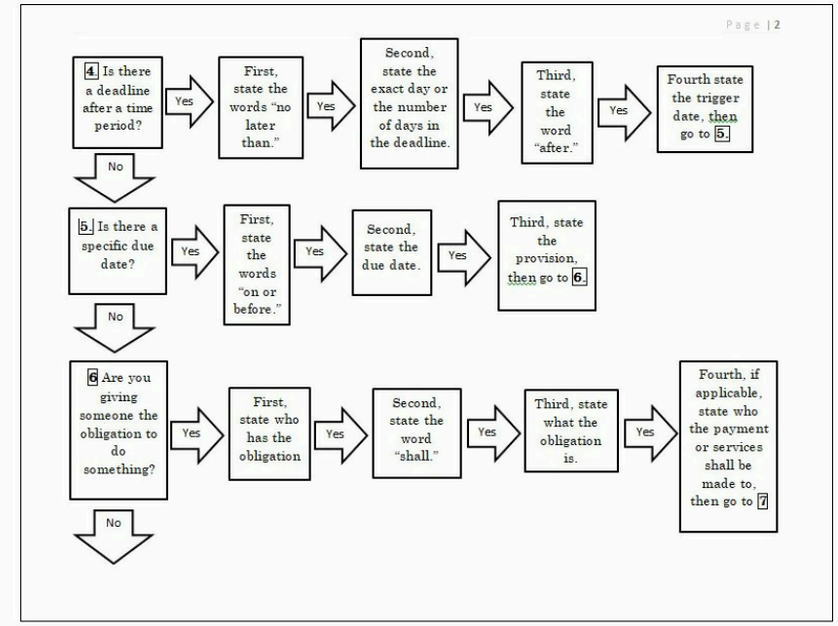
4. Draft an Amendment to the Sale of Assets Agreement changing the purchase price to $110,000, changing the deposit to $11,000, and deleting the representation regarding legal proceedings against the seller.

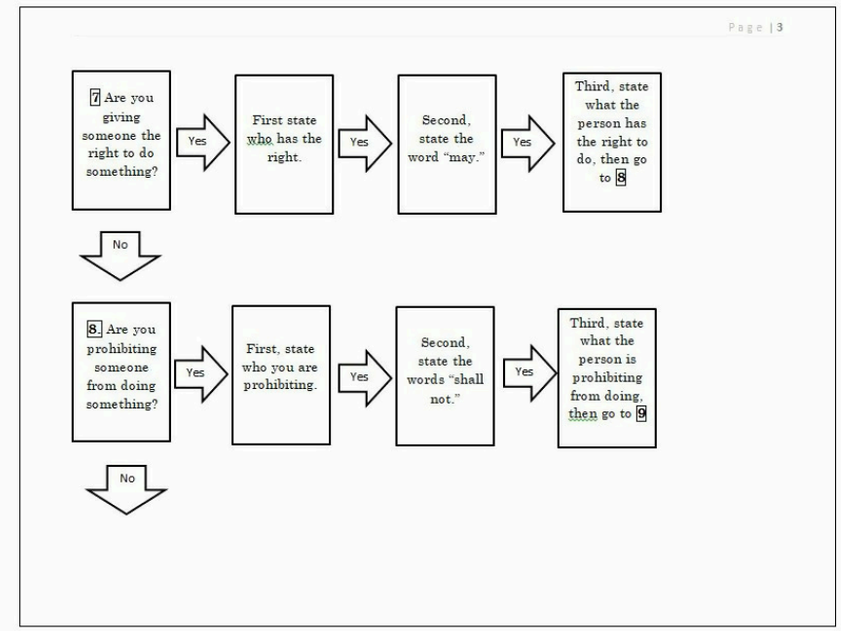
5. Draft an Amendment to the Consulting Services Agreement changing the hourly rate to $250/hr., making payments for services due in 14 calendar days, and deleting the $200 cancellation fee.

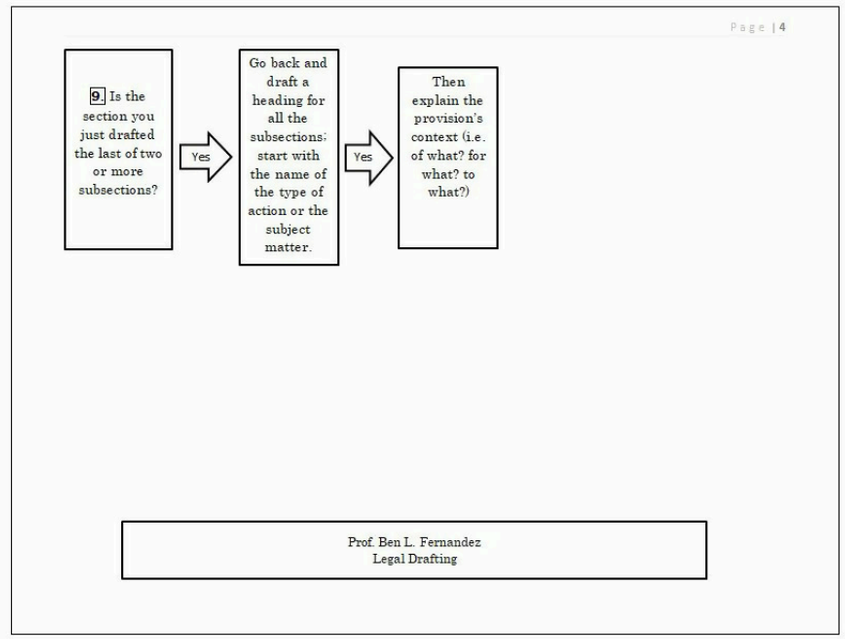
APPENDIX

FLOWCHART FOR DRAFTING CONTRACT PROVISIONS









CONTRACT DRAFTING CHECKLIST

1. Begin your provisions with the name of a party, not a non-party or a thing.

2. Use “shall” or “will” to obligate the party to act.

3. Use “shall not” or “will not” to prohibit the party from acting.

4. Use “may” to give the party the right to act.

5. Don’t use any other words for obligations, prohibitions or rights. (i.e., don’t use “agrees,” “has discretion,” “is prohibited,” “is required to,” etc.).

6. Draft descriptions as past or present tense statements. There is seldom a need to use future tense in an agreement.

7. Make the subject of sentences the relevant party; use active voice.

8. Make sentences complete (state who, what, to whom, when and how, if applicable).

9. Omit legalese and other needless jargon.

10. Proofread for spelling, punctuation, and grammar.

11. Start with a Title identifying the type of contract.

12. Then an Exordium containing the following information: effective date, name of parties, address and state of organization, if applicable, reference to title, and expression of intent to be bound by the contract's provisions (don't give this section a heading).

13. Use short forms to refer to the parties and the agreement (put in parenthesis; start with a capital letter).

14. Use a heading for each subsequent section of contract (except for the testimonium and the signature lines at the end); subsections should also have headings. Each heading and subsection should be numbered or lettered, if there is more than one.

15. Draft a Background of Agreement section, if applicable. Recite business or nature of parties, history and reasons for transaction, or description of subject matter. Use descriptive statements.

16.Obligate each side to complete their part of the bargain; express the core exchange of promises between the parties. (use "will" or "shall").

17. Draft Duration, if applicable. Describe the intended length of the period and state the beginning and ending dates.

18. Draft provisions for the details of the agreement. Expand upon the services to be provided and payments to be made. Express the details of when, where, and how. (don't label this section "Obligations of X" and "Obligations of Y").

19. Payment Clauses. Indicate who payment is to, when it is due, how it is to be made, and what payment is for.

20. Time Clauses. Use "on" for due dates, "before," "on or

before," "after," "on or after," "no later than," or "no earlier than" for deadlines. Make sure the "trigger date" is clear. Use days instead of weeks or months.

21. Conditions. Use "if," "unless," or "except." If a time clause modifies a condition, place the time clause within the phrase of the condition the time clause refers to. Don't "sandwich" the time clause.

22. Insurance. Use "will maintain" or "shall maintain." Identify the type of insurance and amount of coverage. Name the other party as beneficiary / loss payee. Require the party to provide proof of insurance.

23. Indemnity. Use "will" or "shall." Identify the person the clause applies to. Specify the items indemnified. Indicate if negligence and attorney's fees are included. State any exceptions, like the indenmnitee's own negligence.

24. Termination / Cancellation. Use "may." Cancellation if breach; otherwise termination, if a contract for the sale of goods. Specify method of termination.

25. Modification. Descriptive policy that modifications are valid only if done with a written record signed by all parties.

26. Integration / Merger. Describe the parole evidence rule. Contract is integrated, complete, and final. Prior agreements are merged, superseded.

27. Forum Selection / Venue. Describe forum choice. Make the clause mandatory and exclusive. Delineate the scope of the clause.

28. Applicable Law. Describe choice for applicable law. State what law applies to determine the scope of the choice of law clause.

29. Testimonium. "Executed by the parties as of the date

written above." Do not use legalese. (do not give this section a heading).

30. Signature Lines. Include the name for an individual (personal liability); "by," "name," and "title" if a representative (no personal liability).

DRAFTING EXERCISES

M E M O R A N D U M

To: _____

From: _____

Date: _____

Subject: Associate Employment Agreement

_____

Welcome to Big Law, LLP. I have a project I would like you to start working on a.s.a.p. As you know, Big Law hires the best and the brightest law students from the top law schools in Florida. Big Law is a limited liability partnership located at 456 Gulf Shore Boulevard in Naples, Florida. We are a large general practice firm, and employ approximately 300 lawyers.

Every year, Big Law interviews students at top Florida law

schools, then does call back interviews at the firm for a small group of highly qualified applicants. Right now, we are hiring about a dozen associates per year, but that may change depending upon market conditions.

Although the firm's associates have historically been employees at will, Big Law would like to make the firm more marketable to prospective associates by offering them written contracts. And we would like your help drafting a form document we can use.

The agreement will be for a one-year term, renewable at the end of each year at our option (not the associate's option). We will let the associate know three months before the end of the term. The employer should be Big Law; and you will need to insert blanks for the employee, a law student residing in Florida.

We think it is important to make clear in the agreement we rely on the veracity of the statements in each candidate's resume. If any of those statements turn out to be false, we would want the right to end the relationship. And we would also want the right to do that if the candidate either fails to graduate from law school or fails to pass the bar exam (or is subsequently disbarred).

As you know, we pay our associates well. The starting salary is $160,000 per year (payable every other week). We provide full health insurance coverage, dental and vision insurance for the associate and his or her family, as well as a life insurance policy in the amount of $250,000. Also, we make matching contributions to a 401(k) plan of up to six percent of the associate's salary.

Big law agrees to reimburse associates for their yearly license fee and the cost of attendance at continuing legal education conferences within the associate's area(s) of expertise or

for approved legal ethics, bias elimination, substance abuse, or mental illness awareness programs, or professionalism programs.

We do not require our associates to reimburse the firm for damages caused by them as a result of their negligence. But we do require associates to reimburse the firm for uninsured losses caused by the associate's gross negligence or willful misconduct. (Uninsured losses may occur either because the relevant conduct isn't covered or because it is covered but a deductible applies to a portion of the loss.)

In exchange we require all associates to work a minimum of 1,800 billable hours per year. Time is billable only if it is spent working on a specific matter for a client of the firm. Associates must keep track of their time every day and submit daily timesheets to their administrative assistant.

Clients of the firm must always be represented by associates in a competent, professional and ethical manner, in accordance with prevailing standards of legal practice. Also, associates are required to attend periodic department meetings and other firm events, and comply with any ethical requirements for continuing legal education.

As long as each associate meets the billable hour's requirement, the associate is welcome to take up to four weeks' vacation. And, as long as that requirement is met, he or she can do as much pro bono work as he or she desires. However, the associate must inform the firm of the pro bono work and arrange for a partner of the firm to provide supervision for the work.

It should also be made clear, however, that time spent completing administrative tasks, attending continuing legal education classes, working on pro bono cases, and other matters not billable to a firm client for a specific matter is not

included in the billable hour's requirement.

In addition, we require associates to devote all of their professional time, attention and energies to the business of Law Firm (e.g., an associate cannot work at the firm and also have their own practice on the side). Here is a sample provision I found in an employment agreement for a pharmacist (you will have to fix the language):

> Fidelity. The Agent agrees to devote all of the Agent's professional time, attention and energies to the pharmaceutical business of the hereinbefore mentioned Corporation. During the term of this contract, said Agent may not at any time hereafter engage in the practice of pharmacy to any extent whatsoever, except pursuant to this arrangement with the Corporation.

The firm expects associates to act in an appropriate manner at all times, and not engage in any conduct that would hurt the firm's reputation. Discrimination against employees of the firm on the basis of race or gender, and sexual harassment will not be tolerated and will also be grounds for dismissal. Here is another sample provision I found in an employment agreement for a realtor (again, you will have to fix the language).

> Conduct. Any conduct that might injure the professional reputation and standing of Employer in the real estate brokerage community shall not hereafter be engaged in by the Employee. Discrimination against brokers, salesmen and other employees of the Employer, on the basis of race or gender also may not be engaged in by aforementioned Employee; and said employee must not sexually harass employees of said Employer.

We review each associate's performance in a yearly evaluation. If the associate's performance is satisfactory to us and the associate's services are still needed by the firm, then we would want to have the right to renew the contract for an additional year. If not, then we would want to have the right to end the associate's employment.

If an associate desires to leave the firm, he or she must give us at least thirty days' written notice. Associates are not permitted to solicit business from any client of the firm for a period of one year after they leave, regardless of whether the employee resigns or is terminated. Also, the identities of the firm's clients and the matters in which we represent them have to be kept confidential.

Please add the usual administrative provisions at the end of the agreement. Agreements not included in the final document will be superseded. Oral modifications after the agreement is signed will not be valid. Florida law will be applied. If there is a dispute, the parties have to try mediation to resolve it first (we agree to pay the cost). If that doesn't work, then any lawsuits should be brought in the county the firm is located in.

Thank you in advance for your assistance.

TRANSCRIPT OF CLIENT INTAKE FOR LAPTOP PURCHASE AGREEMENT

Rodriguez: Good morning.

Lancaster: Good morning, Ben. How are you?

Rodriguez: I am well, Margaret. Thank you.

Lancaster: So, what brings you in today?

Rodriguez: Well, I've been working on an agreement with Apple computer. I want you to document it.

Lancaster: Wonderful. Is the agreement with the University or just the Law School?

Rodriguez: I think it should be with the Levin College of Law.

Lancaster: We've worked with Apple before. I think the legal name is "Apple, Inc." and they are out of California, right?

Rodriguez: Yes, they are a Delaware corporation located in California. The address is One Apple Park Way in Cupertino.

Lancaster: I've been there. The giant circular building?

Rodriguez: That's it. Anyway, we went there to work with Apple to address a student / teacher issue we've been dealing with. Students like to use laptops in class, but teachers find them distracting. Many of the law school professors have outright banned them.

Lancaster: I see the issue. But it's not really the computer that is the problem; it is the internet, right?

Rodriguez: Exactly. As it turns out, Apple has people working on the same issue: making a classroom-friendly computer product. You know, Apple has a lot of interest in education and working with teachers to assimilate computers into the classroom.

Lancaster: I know. So, did you come up with a solution?

Rodriguez: I think so. Apple is going to develop a line of classroom approved computers for us, and we are going to give them to all the entering 1L students.

Lancaster: Wow. A free laptop for every student. Sounds like a good marketing idea.

Rodriguez: It is, isn't it? We'll raise the tuition $1,000 to compensate, but that's another issue.

Lancaster: So, what is a classroom approved computer?

Rodriguez: Well, it's basically the MacBook Air model with certain modifications.

Lancaster: How is it different?

Rodriguez: First and foremost, it is Wi-fi and Bluetooth disabled. In other words, it doesn't have either of those features, and it is made so neither can be added. That's

important, so we want them to put in writing in the contract that these computers cannot be used for internet access.

Lancaster: I guess that takes care of internet surfing and e-mailing in class.

Rodriguez: Right. Second, it is preloaded with E-books for all required courses. We've already given the books to Apple, so they can upload them to each laptop.

Lancaster: What a great idea. No more lugging around a backpack full of books. The students will love that.

Rodriguez: Third, in terms of software, the laptops will also come with Microsoft Word, Acrobat Reader, Dragon Naturally Speaking, and Grammarly. But programs like Safari, Mail, Messages, iTunes, and Facetime will all be deleted.

Lancaster: Hmm. I've never heard of Dragon Naturally Speaking. What is that? Dictation software?

Rodriguez: Yes, it's fantastic. You should try it in your practice. Once you get used to using it, you will wonder how you did without it.

Lancaster: O.k., is that it?

Rodriguez: No, one more thing. The enclosure for each computer will be blue on the bottom and orange on the top, and the gator logo will also be on the top. We saw a prototype yesterday. It was great. The gator lights up when you turn the computer on.

Lancaster: Wow. I think these will be a hit. So, is UF committing to buy a certain number of the laptops?

Rodriguez: Yes. For starters, we are buying 250 laptops for $1,000 each. So that's $250,000 total.

Lancaster: That's a lot of laptops!

Rodriguez: Well, they will be delivered to the Faculty Lounge in Holland Hall. They should be there by August 1st. If they come early, that's fine. But they have to be there by the 1st so we can get them to the students before classes start.

Lancaster: Do they have to be set up or prepped or anything before the students get them?

Rodriguez: No, they are ready to go. Just open the box and plug them in.

Lancaster: Great. How is the University paying? Lump sum? Installments?

Rodriguez: Installments. Apple didn't like it, but they agreed to let us pay $6,944.44 per month for three years. Payments are due the first of each month.

Lancaster: Late fee?

Rodriguez: No. We decided that if a payment is late, Apple has to give us written notice and one month to cure. If we then make the payment plus simple interest at the default rate of 12% per annum, the breach is cured. But if we don't make the payment within one month, then we have to pay the remaining balance in full.

Lancaster: Two questions. Does the cure period start when the notice is received? And does interest accrue just on the outstanding payment?

Rodriguez: Yes, and yes.

Lancaster: O.k.

Rodriguez: And the payments are by wire transfer. We'll need wire instructions from Apple to make that happen, so make

sure they are obligated to give the instructions before the first payment is due.

Lancaster: Isn't the first payment due when the contract is signed?

Rodriguez: No, the payments start when the laptops are delivered.

Lancaster: O.k.

Rodriguez: Now, one of the things that was important to Apple was the law school agree to adopt a policy approving the use of these computers in all classes. So, we should probably put that in there somewhere.

Lancaster: O.k. What about repairs and maintenance? How will that work?

Rodriguez: A representative of Apple will come to the school once a week during each semester and handle any repair or replacement claims. We will give the representative a table or a booth in the student lounge to work out of. Don't put that in the contract though. Just make sure they are obligated to provide that service.

Lancaster: For how long will Apple provide that service?

Rodriguez: Three years from when the computers are delivered.

Lancaster: Will the University pay for the service?

Rodriguez: Yes. It's an extra $250 per month, due on the first day of each month. We'll pay the rent by check. And we can terminate at any time. These units should be fairly trouble-free so there may be no need for repairs.

Lancaster: What about notice and an opportunity to cure?

Does that apply to the rental period too?

Rodriguez: No. They are going to give us a one-week grace period. After that, there is a $25 late fee. And they can cancel the lease if any payment is more than a month overdue. Of course, if they cancel the lease, we still have to continue paying for the computers.

Lancaster: What about a warranty? Is there some type of warranty?

Rodriguez: Yes, it is the same for any other MacBook Air. Apple has it on their website. I don't think we need to restate it in the contract.

Lancaster: Yeah, but the law school is not an authorized reseller. Can the students still take advantage of the warranty?

Rodriguez: Yes, we talked about that when we were in California. Apple is giving the University the right to transfer the warranty to the students. Also, computers bought or received from the University pursuant to this arrangement will be eligible for participation in Apple's GiveBack Program. You can read about that on the website.

Lancaster: O.k., so even though the school is not an authorized reseller, like a store selling computers to the public, computers received from the school are still covered by the warranty, and they are still eligible for participation in the GiveBack Program.

Rodriguez: Correct. But there is a condition.

Lancaster: What?

Rodriguez: To obtain warranty coverage for the students, UF has to give Apple the name and address of every student receiving a computer pursuant to this program. The same is true of the GiveBack program.

Lancaster: What else did you talk about when you were in California?

Rodriguez: Let's see. We agreed not to sell or give these computers to anyone other than students at UF. Also, Apple agreed we could advertise these computers on campus, as long as we use their marketing materials; and they said they would provide us with what we need.

Lancaster: When do we get the marketing materials?

Rodriguez: Within a month after the contract is signed.

Lancaster: It almost sounds like UF will be an agent of Apple.

Rodriguez: Apple doesn't want that. In fact, they want the contract to make clear we are not employees or agents.

Lancaster: What if 2Ls and 3Ls want the computers? You said the school was only giving them to first year students, didn't you?

Rodriguez: Yes, but 2Ls and 3Ls can also buy them directly from Apple. If they verify their status by providing a student ID, Apple agreed that they will sell them a classroom-approved computer for $1,000. That's the same price we pay.

Lancaster: O.k. You didn't agree to any exculpatory provisions, did you?

Rodriguez: We resisted but they wanted an indemnity, so we have to give them one. Draft it narrowly, of course. But we do need to include an indemnity.

Lancaster: Release?

Rodriguez: No release. No waiver. Just the indemnity.

Lancaster: What about administrative provisions? I would normally have the parties agree that Florida law applies, and, if

there is litigation, it will be commenced in Alachua County.

Rodriguez: Good. That's fine. There have also been a lot of side discussions leading up to this agreement. Likely, that will continue. Representatives of each side may also try to decide on changes to the agreement after it is signed. But we want to prevent all that. If it isn't in writing and signed by the parties, it isn't part of the arrangement. And that should be true whether someone claims it was decided before the document was signed or after it was executed. Do you know what I mean?

Lancaster: Yes. I can take care of those issues with a couple standard provisions.

Rodriguez: Excellent. I think that's about it.

Lancaster: O.k., I can have a draft for you a week from today. Is that o.k.?

Rodriguez: Yes, that's fine. I look forward to reviewing it.

MEMORANDUM FOR RESIDENTIAL LEASE AGREEMENT

MEMORANDUM

TO: _____

FROM: _____

DATE: _____

SUBJECT: Residential Lease Agreement

_____

I need your help drafting a residential lease. As part of its efforts to rise in prominence and the US News and World Report rankings, the University of Florida has hired Harvard Professor, Dr. Cornel West as a visiting professor for the next academic year. Dr. West will teach two courses at UF next year, and he will also do a number of public speaking engagements at the school.

While Dr. West is in Gainesville, he will be renting

the Powell University House at 2151 W University Ave, Gainesville, FL 32603. UF has been using the Powell House for alumni events, but recently converted the building back to a residence for prominent visiting faculty. The house has five bedrooms and three bathrooms. It is 4,345 square feet and includes a pool in the back yard. I need you to draft a lease for the rental of that space by Dr. West.

At the outset, I want to make clear that we do not want to use a form lease or any canned rental provisions for this contract. The relationship between the University and Dr. Cornel is not the usual relationship between a landlord and tenant. Among other things, the school is not renting the space for a profit and it is not in the business of renting such space. Dr. West is a guest of the school, and UF wants to make sure he is well taken care of while he is living in Gainesville.

What I am looking for then is a readable document that sets forth the arrangement between the parties in a clear and concise way. Don't include any legalese. Use active voice and keep your sentences short and simple. Use what you learned in your legal drafting class and draft the lease from scratch.

The owner of the Powell House is the University Housing Corp., a Florida corporation. Use 210 Gerson Hall P.O. Box 117166, Gainesville, FL 32611-7166 as the address for the corporation, and the address for the Powell University House as Dr. West's address.

The parties agreed that the lease will be for ten months starting on August 1st and ending on May 31st; and the rent will be $1,500 per month due on the first day of the month.

The house will be fully furnished. In fact, there are a number of very expensive antiques in the Powell House, so we will need $1,500 security deposit. If either the building or

the furniture is damaged, we should be able to use the deposit money to cover the cost to repair or replace the applicable items. And we'll give the remaining balance back after the end of the term. If the damages exceed the amount of the deposit, it should be clear the excess will have to be paid by Dr. Cornel on demand. Also, with regard to the deposit, please make sure the lease complies with Fla. Stat. sec. 83.49. But don't worry about any other legal requirements for leases in Florida.

UF agrees to take care of the maintenance for the outside of the house, like cleaning the pool, spraying for bugs and keeping the lawn mowed. We will probably be there once a week but don't put that in the lease. Just say we'll do the maintenance. If more is needed, Dr. Cornell has to let us know.

UF pays the taxes on the Powell House and plans to obtain hazard insurance for the house. If Dr. West gets a tax bill, he must send it to us within a few days. Also, Dr. West has agreed to pay the premium for the insurance, and he won't engage in any activities that would result in a premium increase.

Dr. West has also agreed to maintain the inside of the house and keep it clean and sanitary. He knows there are valuable antiques inside, and he will make reasonable efforts to protect them from damage. Pets are not allowed; and smoking is not allowed either.

I think it goes without saying, but let's make it clear anyway, Dr. West can't make any alterations to the inside of the house without the written consent of UF. And that includes painting the walls, putting pictures or paintings up, or taking down what is already hanging.

As with any lease, the landlord, UF should have the right to make periodic inspections of the house. But the University won't do that unless the inspections are during

the week between the hours of 9:00 and 5:00 pm. Also, the University has agreed to give Dr. West at least a week's notice in advance of any inspection. And the notice will be provided in writing, since Dr. West is notorious for not reading e-mails.

The plan is for Dr. West to teach during the fall and spring semesters, but there is a possibility he may stay an additional year. So he should have the ability to renew for an additional year, if his tenure as visiting professor is extended. To do that he should give UF written notice at least a month before the lease ends. Also, if for any reason Dr. West is not happy or otherwise wants to end the lease, he should be able to do so. UF only requires that it be given at least one month's notice, in writing.

If there are any problems with Dr. West not paying the rent on time, UF will work to resolve the issue without any penalties being imposed. So there should be no late fees, and costs of collection need not be included. If any payment is not received, the University is going to send Dr. West a written notice, reminding him the rent is due, and he will have two weeks after he receives the notice to rectify the situation by making the payment. Only if the payment is still not received after the notice and two week period can the University terminate the lease and pursue legal action, if necessary.

There are some "boilerplate" provisions you should be sure to include. We don't want Dr. West to be able to assign his interests in the lease or sublet any of the space. We should make clear that "time is of the essence." Also, any lawsuits should be brought in Alachua County, and the law that applies should be Florida.

W. Kent Fuchs will be signing the lease for the school and, obviously, Dr. West will sign for himself. I think that's it. If you have any questions, please do not hesitate to contact me.

Thanks in advance for your help.

MEMORANDUM FOR SALE OF ASSETS AGREEMENT

MEMORANDUM

TO: _____

FROM: _____

DATE: _____

SUBJECT: Sale of Assets Agreement

_____

We represent Coffee Castle LLC in connection with its sale of business assets (the equipment in an on campus kitchen kiosk) to Food Enterprises, Inc. d/b/a Bagel World. Coffee Castle is located at 309 Village Drive in Gainesville. Bagel world has a place of business at 4113 NW 16th Blvd in Gainesville. Coffee Castle is a Florida limited liability company and Food Enterprises is a Florida corporation.

Coffee Castle has been selling various coffees on

campus for five years, and its lease is now up. The school wants a vendor with a broader menu, including sandwiches for breakfast and lunch. Accordingly, Bagel World has been chosen as a replacement tenant. Rather than retain the equipment it was using, Coffee Castle has agreed to sell it to Bagel World.

A list of the equipment Coffee Castle is selling to Bagel World is attached. Basically it is everything you need to run a coffee store, except the coffee and the paper cups. Coffee Castle is selling the equipment without any implied warranties (i.e., merchantability or fitness for use). The purchase price is $100,000 payable at a closing at the law offices of Tickle, Bice and Erp, LLC, 172 Main Street, Gainesville on December 1, 2019. Payment must be made by cashier's check or wire transfer.

Prior to the closing, the parties have agreed that Bagel World will have the opportunity to do further inspections of the equipment to confirm that the equipment is in good working condition and fit for use in Bagel World's business. The inspections should be between 9:00 a.m. and 5:00 p.m. at Coffee Castle, and they should be completed within a couple weeks. Also, Bagel World needs to give Coffee Castle 24 hours advance notice.

Bagel World also plans to do a UCC lien search to confirm there are no liens on the equipment. If there are, Bagel World will want to back out of the deal.

At the closing, Coffee Castle has agreed to deliver a bill of sale for the equipment, as well as any operating manuals and warranty terms. Also, Coffee Castle needs to produce a clerk certificate and resolution confirming the sale is authorized and is not a sale of substantially all the assets of Coffee Castle. (Coffee Castle has over 100 other locations in Florida.)

To induce Bagel World to enter into this transaction, Coffee Castle represented and warranted that it was a corporation in good standing, authorized to do business in Florida; each of the pieces of the equipment is in good operating condition; Coffee Castle owns the equipment and there are no liens on any of the items comprising the equipment. Also, there are no legal proceedings pending against Coffee Castle that would affect the equipment in any way. Each of these representations and warranties should be stated in the contract.

Bagel World is giving Coffee Castle a $10,000 deposit when the contract is signed. The deposit will serve as liquidated damages if Bagel World fails to fulfill its obligations under the contract. Please note, however, Bagel World has the right to terminate the contract and receive the deposit back if the equipment fails inspection or Bagel World discovers a prior lien on the equipment. If the transaction goes through, the deposit will be credited to the purchase price.

Until the transaction is completed, Coffee Castle has agreed to properly store the equipment and ensure it is not damaged or stolen. Coffee Castle must clean the equipment prior to the closing so that it will be ready for use. And Coffee Castle also granted Bagel World's request that the equipment be taken off the market and not shown to any other prospective buyers.

After the closing, there will be no need for Coffee Castle to ship the equipment to Bagel World. Rather, it will be turned over to Bagel World at 309 Village Drive (Bagel World will be using the same location Coffee Castle used). Bagel World has already signed a lease with the school, renting the space as of the closing date for this transaction. Bagel World has not yet decided if it will use the name "Bagel World" for the business. That is not a concern for Coffee Castle, as long as Bagel World does not use the name "Coffee Castle."

The agreement should make clear prior statements and understandings are not enforceable unless memorialized in the contract. Subsequent agreements are also invalid unless reduced to writing and signed by the parties. Florida law will govern the interpretation of the agreement. If there is a lawsuit, the parties agree it will be commenced in Alachua County. Those are all standard "boilerplate" provisions.

I think that's it for now. Please have a draft on my desk by morning. Thank you for your assistance.

Exhibit A

Equipment List

1. Two Cecilware ESP2-220V Venezia II Two Group Espresso Machines 240V

2. One Cecilware HC-600 Venezia II Espresso Grinder - 120V

3. One Grindmaster 810S Black ETL Slimline 1.5 lb. Coffee Grinder - 115V

4. Four Grindmaster B-3 PrecisionBrew Digital 64 oz. Automatic Coffee Brewers

5. Eight WebstaurantStore Logo 64 oz. Glass Coffee Decanters with Brown Handles

6. One Cecilware TB3 3 Gallon Iced Tea Brewer with B-1/3 Dispenser - 120V

7. Two 3 Gallon Satin-Finish Stainless Steel Iced Tea Dispensers

8. One Avantco HWD15G 1.5 Gallon Hot Water Dispenser - 120V, 1450W

9. One Avatoast T140 Conveyor Toaster with 3" Opening - 120V (Formerly Avantco T140)

10. Two Merrychef eikon e3-1330 High-Speed Accelerated Cooking Countertop Ovens

11. One Avantco SS-2R-HC 54" Solid Door Reach-In Refrigerator

12. One Avantco APT-48-HC 48" 2 Door Refrigerated Sandwich Prep Table

13. One Scotsman C0330MA-1D Prodigy Series 30" Air Cooled Medium Cube Ice Machine with Bin - 400 lb.

14. One Choice 3 Tray Bakery Display Case with Rear Doors - 21" x 17 3/4" x 16 1/2"

15. One Noble Warewashing I-E Single Rack Low Temperature Door-Type Dish Machine - 115V

TRANSCRIPT OF CLIENT INTAKE FOR CONSULTING SERVICES AGREEMENT

Client Intake for AutoDocs

Consulting Services Agreement

Chang: Hello Mr. Ruiz. How are you?

Ruiz: I am well. Thank you for seeing me on a Saturday.

Chang: Oh please! I haven't had a weekend off since I started at this firm.

Ruiz: Busy?

Chang: You have no idea. So what brings you in today?

Ruiz: I want you to prepare a form of consulting agreement I can use for my new business.

Chang: I didn't know you started a business. Congratulations!

Ruiz: Thank you. Basically what I do is provide training and advice to lawyers and law firms interested in using AutoDocs to draft legal documents. The business is a Florida corporation called AutoDocs Consulting Corp., and it has a legal address of 112 West Street in Gainesville.

Chang: Great idea! I thought about using document assembly software for my practice but it's a steep learning curve, and I think it would take a while to put the templates together.

Ruiz: That's where I come in. I train someone like you to use the software, and I help you get everything set up. I can do the whole thing in one weekend. By Monday morning you'll be up and running.

Chang: That's a great idea. So the service you provide is AutoDocs training?

Ruiz: Well, there's a lot to it. I actually wrote down my own description of what I do, if you'd like to see it. The language is pretty technical so I figured this would help. Here is what I put together:

Description of Services

Document automation training concerning the use of AutoDocs document assembly software, including how to create user-friendly templates and to generate documents, including templates with multiple authors; how to create and use a template repository with centralized template creation and management, permissions for individuals and groups based on roles, check in/check-out functionality, roll-back, and forward

publishing; how to generate documents via browser-based templates in the cloud, on-premise or on Abacus Private Cloud; how to use the AutoDocs user interface, including how to efficiently manage the permissions of end users and groups with a tight and synchronized integration with active directory; how to integrate with business systems such as BPM, CRM, DMS, ECM, and e-signature technologies; and how to keep track of template versions uploaded to production environments, noting when, why and who uploaded and published.

Chang: That's very helpful. Thank you. I'll use that language verbatim.

Ruiz: Wonderful.

Chang: Now, did you say you also help the client put together a set of templates for documents he actually uses in his practice?

Ruiz: Yes. I'll talk to the client ahead of time about his practice and we'll agree on a set of documents to automate, then I'll likely give him an estimate of the cost to automate the documents and we'll agree on a date by which that work will be done.

Chang: Do you want me to put the estimate and the deadline in the document?

Ruiz: Yes. My hourly rate is $200 per hour. The estimate is just for the automation of the documents. I can't guarantee the final bill will not exceed that amount, but I'll try to keep the work on budget; and, if it looks like we are going over budget by more than say 20% I'll tell the client before the costs are

incurred.

Chang: All right. I'll have to figure out how to draft that. But I understand what you are looking for.

Ruiz: I decided I want to collect 50% of the estimated cost of the automation up front and the other 50% within a week after the consultation is completed. The training fees I bill monthly and expect payment in 30 days.

Chang: O.K. That seems reasonable.

Ruiz: And it's fine with me if you make clear I don't' get reimbursed for travel, parking, meals, lodging or anything like that. Probably, the client will want that in there.

Chang: Fair enough. What about the equipment and supplies you use? Do you provide those?

Ruiz: Actually no. I use the client's computer, install the software on their system, and then work on the documents they have.

Chang: I guess the client will probably prefer it that way.

Ruiz: Right. They will be worried about me keeping confidential whatever they tell me about how they practice and the methods they use. And they will want to prohibit me from copying, using or distributing their form documents. If I do everything on their system, they will feel more at ease about protecting their own information and documents.

Chang: I see. Should I also mention in the agreement you will keep communications confidential and your work product will be solely their property.

Ruiz: I think so, yes; and the standard things too. I'm an independent contractor, not an employee, so they don't have to worry about withholding taxes or paying benefits and

that type of thing. That's standard for this type of agreement, right?

Chang: Yes. I forgot to ask. Will this agreement be in effect for some time period?

Ruiz: Yes. I do most of the work in a short period, like over the weekend. But then I make myself available for an additional guidance during the first year of use. So the agreement has a one year term.

Chang: Can you or the client terminate for any reason?

Ruiz: Just if the other side doesn't do what it agreed to do. That's fair, right?

Chang: Yes, absolutely. I'll also add the usual provisions that Florida law applies, any lawsuits will be brought in Alachua County, etc.

Ruiz: I think the agreement should also state the parties can't assign it.

Chang: O.k. And then I usually make clear prior statement and agreements are not enforceable unless made part of the agreement; and subsequent agreement have to be reduced to writing and signed to be enforceable.

Ruiz: Sounds perfect.

Chang: Let's see. What have we left out?

Ruiz: There is one more thing. I can do the automation whenever they want. But the training is different. I do one on one training Monday through Sunday between 9 and 5 for a maximum of 10 hours per week. I have other clients so I can't spend more time than that with any one client.

Chang: O.k.

Ruiz: I can also do a class for the client's employees. That would have to be between 9 and 5, Monday through Friday. And the maximum number of classes I can do is 3 per week.

Chang: What if a client cancels an appointment or class, or doesn't show up at the scheduled time?

Ruiz: I charge a cancellation fee of $200 for that. I've thought about doing more, but it hasn't been a problem. So just put the $200 cancellation fee in there and we should be all set.

Chang: O.k. I can put together a draft and have something for you to review by _____ ___, 20__.

Ruiz: Wonderful. Thank you.

Chang: Always a pleasure.

Ruiz: Same here. Take the rest of the day off.

Chang: Hah hah.

INTRODUCTION TO COMMERCIAL REAL ESTATE LOAN DOCUMENTS

One of the most common areas of practice for transactional lawyers is commercial real estate lending. The documents that are typically used for that type of transaction are a promissory note, guaranty, loan agreement, real estate mortgage and security agreement. Needless to say, it is exceedingly unlikely that you would ever be asked to draft those documents from scratch. If you need to develop your own set of forms, you will likely do that by looking at precedent language in other documents. More often, the firm you are working for or the institutional client you represent will have their own set of documents they will want you to use. So, your job will be to tailor those documents to the terms of the deal you are handling. To do that you will need a solid understanding of what those documents are and why they are used to protect a lender's interests in a commercial real estate transaction.

A. Promissory Note

A promissory note contains the borrower's promise to repay the loan. To understand why promissory notes are drafted the way they are you have to first have a basic understanding of the business of banking. From a bank's perspective, the character of a financial transaction is the opposite of what it is from the customer's perspective. When you deposit money with a bank, you create a liability for the bank. Effectively, you are making a demand loan to the bank for the amount of the deposit. Similarly, when you borrow money from the bank, you are effectively creating an asset for the bank. From the bank's perspective a loan is an asset, just like a corporate bond, except the issuer is the bank's customer not a corporation. On the books of the bank, deposits are liabilities and loans are assets.

Because a promissory note evidences an asset, it is important that the bank be able to sell or transfer it to other banks or outside investors. Typically bank loans are pooled in the secondary market and then securitized to enable investors to invest in the pool of loans, just like investors invest in groups of stocks by investing in a mutual fund. To facilitate that process, promissory notes are usually drafted to qualify as negotiable instruments under Article III of the Uniform Commercial Code.

A negotiable instrument is typically defined as "an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges" that is (1) payable to bearer or to order, (2) payable on demand or at a definite time; and (3) contains no other undertakings in addition to the payment of money, except an undertaking or power to give collateral to secure payment, an authorization or power to the holder to confess judgment or realize on or dispose of collateral; or a waiver of the benefit of any law

intended for the advantage or protection of an obligor. E.g., Fla. Stat. § 673.1041.

For these reasons, promissory notes are typically very simple and short. There is no exordium and no background section. The body of the document is usually just the core obligation (the promise to repay the loan). Rather than using "will," the obligation is often drafted with "promises to". Also, to comply with Article III, it is made clear that the payee is not simply the lender, but rather "to the order of" the lender.

> For value received, the undersigned _____, a _____ corporation, with an address of _____ (the "Borrower"), promises to pay to the order of _____ Bank, a _____ Bank with an address of _____ (together with its successors and assigns, the "Lender"), the principal amount of _____ Thousand Dollars and Zero Cents ($____,000.00) on or before _____ __, ____ (the "Maturity Date"), as set forth below, together with interest from the date hereof on the unpaid principal balance from time to time outstanding until paid in full.

Next the interest rate and the due date for monthly payments are typically set forth.

> The aggregate principal balance outstanding shall bear interest thereon at a per annum rate equal to _____ Percent (____%). All accrued and unpaid interest shall be payable monthly in arrears on the 1st of each month, commencing on _____, providing that, in any event, on the Maturity Date all outstanding principal, plus interest

> thereon and all costs and expenses, shall be due and payable.

And that's pretty much it. Often there is added a provision for late fees in the event of late payment, and the recovery of attorney's fees, if the loan goes into collection, and the borrower waives diligence, presentment, protest and demand, and notice of protest of demand, of non-payment, of dishonor and of maturity. There may be one administrative provision (typically just choice of law). But otherwise, there are just the testimonium and signature lines. Notably, a promissory note is usually only signed by one party: the borrower.

B. Guaranty

A guaranty is a document in which someone other than the borrower guarantees the borrower's obligation to repay the loan in the even the borrower fails to pay. A guaranty is also a short, simple document, and it is usually organized like a promissory note. A guaranty consists primarily of the core obligation (the guarantors agreement to pay the borrower's debt in the event that the borrower defaults on the loan obligation). Oddly, the lender is often referred to as "you" in a guaranty.

> To induce you to make or continue to make loans or advances, or grant other financial accommodations to _____, a _____ corporation, having an address at _____ ("Borrower"), pursuant to a Promissory Note in the original principal sum of $___,000.00, of even date herewith, and all other documents executed in connection therewith (collectively, the "Loan Documents") and in consideration thereof, the undersigned Guarantor guarantees the payment to you of all sums which may be presently due and owing and of all sums which shall in the future become due and owing to you from the

Borrower under said Loan Documents, and also guarantees the due performance by the Borrower of all its obligations under said Loan Documents.

As with a promissory note, various waivers are often added to the document. And then the document typically ends with just one signature: that of the guarantor.

C. Loan Agreement

A loan agreement contains all the other agreements and representations between the borrower and the bank. Like the other agreements I have discussed in this book, a loan agreement typically starts off with an exordium, background section and definitions.

If the loan is for the construction of the property, then the loan agreement will next include the conditions to making the loan and funding each advance. The conditions to making the loan include what is normally produced at the loan closing, like execution of the loan documents and the delivery of legal opinions. The conditions to each advance often include the borrower's submission of a request in the required form as well as the bank's inspection and approval of whatever work has been done. Also, there is usually an "in balance" provision requiring that the remaining proceeds of the loan provide sufficient funds to complete and operate the project. Here is a brief example:

(C) The Lender may require as a condition of any advance that the Borrower submit satisfactory evidence that the unadvanced portions of the Loan and the Construction Financing are sufficient to pay all costs for the completion of the Project in accordance with the Project Budget and the

approved plans and specifications.

Whether the loan is for construction or acquisition, various representations and warranties will be listed next. These represent the assumptions upon which the decision to lend was based and include the borrower's good standing, if the borrower is an entity, the financial condition of the borrower, the due execution of the loan documents, the borrower's ownership of the property and other similar matters.

After the representations, the borrower's obligations (referred to here a "covenants") are listed, including the borrower's agreement to construct the project, if the loan is a construction loan. Here is an example:

Borrower agrees and covenants with Lender as follows:

A. Construction and Completion of Project. To construct and develop the Project continually and with due diligence in compliance with the Plans and Specifications and applicable law so as to complete the same, in usable condition with full certificates of occupancy and all other required licenses, permits and public approvals issued, on or before the Completion Date.

Among the important covenants to focus on when reviewing or drafting a loan agreement are the financial covenants, including any requirements that the borrower maintain a required financial condition and produce various financial documents. Here is an example of the former:

H. Debt Coverage Ratio. The Borrower shall maintain (i) a Debt Coverage Ratio for the Loan of at least 110%, and (ii) a Debt Coverage Ratio for All Debt of at least 105%. A

Debt Coverage Ratio for All Debt means the ratio calculated by dividing the Net Operating Income for any period by the scheduled debt service for all debt on the Mortgaged Property that requires current debt service, including the Loan, for such period. The Debt Coverage Ratio for the Loan means the ratio calculated by dividing the Net Operating Income for any period by the scheduled debt service for the Loan for such period. The Net Operating Income means, for any period, the difference between the Project's actual rental receipts received during such period less the sum of (x) Operating Expenses paid or accrued during such period plus (y) scheduled deposits to the Replacement Reserve Account for such period.

As you can see, this covenant incorporates a number of detailed definitions that have to be reviewed to fully understand what is required. Financial reporting covenants are also important to review carefully. Here is an example of a reporting requirement:

H. Financial Reporting. The Borrower shall furnish the Lender with such reports, financial statements, records and other information relating to the financial condition or operations of the Borrower and the construction and operation of the Project and as the Lender may reasonably require, including, but not limited to, (i) annual audited financial statements of the Borrower (to be delivered to the Lender within one hundred twenty (120) days of the end of Borrower's fiscal year), and (iii) such other reports to show that the Project is being built and operated consistently with this Agreement, the organizational documents of the Borrower, and the Loan Documents.

In addition to the financial covenants, the loan agreement

may also provide for the creation of various reserve and deposit accounts; and the funds in those accounts may be used to pay for insurance and taxes or maintenance expenses, or the account may be an operating account used for the disbursement of loan proceeds, as in this example:

(g) Borrower shall maintain with Bank throughout the term of the Loan, and any extension thereof, an interest bearing commercial operating account ("Operating Account"). All disbursements of Loan proceeds may be made by the Bank by crediting such disbursements directly into the Operating Account. Borrower agrees that such disbursements shall constitute Advances under this Agreement and the Note. In addition, Borrower authorizes Bank to pay any principal or interest upon the Note when and as the same shall become due under the terms thereof by debiting the Operating Account.

The next section in a loan agreement usually lists the "Events of Default" and the Lender's remedies in the event any of those Events occur. A "default" is a breach of the agreement. An "Event of Default" is a breach of the agreement that continues beyond a prescribed period after notice of is given. If an "Event of Default" occurs the lender usually has the right declare the entire loan amount immediately due and payable (i.e., the lender has the right to "accelerate" the loan). Here are excerpts from two applicable provisions in a loan agreement:

SECTION 7. EVENTS OF DEFAULT

The occurrence of any one or more of the following events constitutes an "Event of Default" under the terms of

this Agreement:

* * *

7.3 The Borrower fails to pay the principal of, or fees, or interest on, the Note or any other indebtedness of the Borrower under the Loan Documents after the same is due and payable and such failure continues beyond the date which is ten (10) days after written demand is made by the Lender.

7.4 The Borrower defaults in the due observance or performance of any other covenant, condition, or agreement to be observed or performed by the Borrower pursuant to the terms of any of the Loan Documents and such default remains uncured thirty (30) days after written notice is given by the Lender to the Borrower.

SECTION 8. RIGHTS ON DEFAULT

Upon the occurrence of any one or more of the Events of Default enumerated in the foregoing Section 7, and at any time thereafter, then:

8.1 The Lender may declare all indebtedness due under the Note and any and all other indebtedness of the Borrower to the Lender due under the other Loan Documents or otherwise to be due and payable, whether or not the indebtedness evidenced by the Note or the other Loan Documents is otherwise due and payable and whether or not the Lender has initiated any foreclosure or other action for the enforcement pursuant to the provisions of the Loan Documents, whereupon all indebtedness due under the Note and the other Loan Documents and any other such

indebtedness becomes immediately due and payable, both as to principal and interest, without presentment, demand, protest, or notice of any kind, all of which are expressly waived by the Borrower.

Like the other agreements discussed in prior chapters, a loan agreement usually ends with various administrative provisions, a testimonium and signature blocks for the borrower and the lender.

D. Real Estate Mortgage

The purpose of a mortgage is to give the lender a security interest in the land and the buildings comprising the project. The core of a real estate mortgage is the conveyance of the property by the borrower to the lender as security for the loan. The language typically used would, for example, be as follows:

The Mortgagor, FOR CONSIDERATION PAID, HEREBY CONVEYS, TRANSFERS, ASSIGNS, SETS-OVER AND GRANTS to the Mortgagee, with mortgage covenants, to secure the payment of _____ and 00/100 Dollars ($_____), with interest and any other charges due thereon, payable as provided in Mortgagor's promissory note of even date (the "Note"), to secure the performance of all covenants and agreements contained herein, in the Note and in a loan agreement of even date between Mortgagor and Mortgagee (the “Loan Agreement”), and to secure the payment and performance of all other debts, covenants and agreements of or by Mortgagor to or for the benefit of Mortgagee now existing or hereafter arising while this mortgage is still undischarged of record, all of its right, title and interest in and to the land, with buildings

and other improvements thereon, whether now existing or hereafter constructed or located, commonly known as and numbered _____, _____, as more particularly described in Exhibit A attached hereto, together with (i) any and all further or additional title, estate, interest or rights which may, at any time, be acquired by Mortgagor in and to such land and improvements, and (ii) all rents, issues, benefits and profits arising from the foregoing.

The Mortgagor is the borrower and the Mortgagee is the lender. After the core obligation or covenant, various additional covenants regarding the use and maintenance of the property (the lender's collateral) are included. If the mortgage is granted in a state that permits non-judicial foreclosures, the lender is also granted a "power of sale" (the power to sell the property and pay off the debt if an Event of Default occurs). Like promissory notes, mortgages are signed by the mortgagee (borrower) only.

After execution, a mortgage must be recorded at the appropriate office. In Florida, mortgages are recorded with the clerk of the circuit court. Also, because mortgages are recorded the mortgagor's signature must typically be notarized and/or witnessed.

E. Security Agreement

The purpose of a security agreement is usually to give the lender a security interest in personal property, like machinery and equipment or inventory (a mortgage gives the lender a security interest in real property). In a real estate deal, this would typically include an assignment of leases and rents. Often the security agreement is incorporated in the mortgage, but it may also be set forth in a separate document. Here is an example of the core grant of a security interest in an

assignment of leases and rents.

As further security for Borrower's payment and performance of the Obligations, Borrower agrees with Lender as follows:

1. Subject to the terms and conditions of this Assignment, Borrower hereby transfers, assigns, and delivers to Lender as security for Borrower's payment and performance of the Obligations all of Borrower's right, title, and interest in and to:

(i) All present and future leases, occupancy agreements, and tenancies with respect to the Premises, together with all renewals, extensions, and modifications thereof (collectively, "Leases");

(ii) All rents and other payments due to Borrower by virtue of the Leases or otherwise due to Borrower as the result of any use, possession, or occupancy of any portion or portions of the Premises (collectively, "Rents"); and

(iii) All right, title, and interest of Borrower in and to all guarantees of the Leases.

The legal requirements for a security interest in personal property are different than the requirements for a security interest in real property. Security interests in personal property are governed by Article IX of the Uniform Commercial Code. Article IX requires, among other things, that security interests in personal property be "perfected" by filing a separate document called a "financing statement" with the appropriate filing office. In Florida financing statements are filed in the Florida Transactions Registry.

The legal requirements for creating a security interests in leases and rents vary from state to state. It may be sufficient to

file the assignment with the mortgage or it may be necessary to file a separate financing statement. And additional steps may be required as well, depending upon whatever state law applies.

That is a quick outline of the documents involved in a commercial real estate loan. And those are typical examples of the types of form documents you often work with in a transactional practice. You probably noticed the sample provisions I included contain some legalese and often don't conform to the conventions discussed in chapters two through six of this book. The primary reason for that is because the documents were drafted before law schools started offering courses on contract drafting. If you get the opportunity to revise the forms you are using, you can do better!

SAMPLE COMMERCIAL REAL ESTATE LOAN DOCUMENTS

PROMISSORY NOTE

Promissory Note

$_____ Date: _____ ___ , 20__

For value received, _____ (the "Borrower") hereby promises to pay to the order of _____ (the "Bank"), at the office of the Bank located at _____, or at such other office as the holder hereof may designate, the principal sum of _____ _____ DOLLARS ($_____) payable in the total number of _____ payments of principal and interest, with each of the first _____ payments in the amount of $_____ and consisting of principal and interest, calculated at the fixed rate set forth below and the final payment to consist of the entire unpaid principal balance plus accrued interest thereon. The first of said payments of principal and interest is to be made on _____ ___, 20___, and the remainder of said payments are payable on the corresponding date of each succeeding _____, with the final payment, unless sooner paid, to be made on _____ ___, 20__.

The interest on the unpaid balance shall be payable on the dates provided above and is to be computed on the basis of a three hundred sixty (360)-day year and actual days elapsed

as follows: at a variable rate per year of _____ (___) percentage points in excess of the Base Rate (as defined in the Loan Agreement (the "Agreement") of even date between the Borrower and the Bank) in effect from time to time at the Bank.

On default or after maturity or after judgment has been rendered on this Note, the unpaid principal balance shall, at the option of the Bank, bear interest at a rate which is three (3) percentage points per annum greater than that which would otherwise be applicable. The Bank may collect a late charge not to exceed six percent (6.00%) of any installment of interest or principal, or of any other amount due to the Bank which is not paid or reimbursed within fourteen (14) days of the due date thereof to defray the extra cost and expense involved in handling such delinquent payment and the increased risk of non-collection. The minimum late charge shall be $25.00.

If, at any time, the rate of interest, together with all amounts which constitute interest and which are reserved, charged or taken by Bank as compensation for fees, services or expenses incidental to the making, negotiating or collection of the loan evidenced hereby, shall be deemed by any competent court of law, governmental agency or tribunal to exceed the maximum rate of interest permitted to be charged by the Bank to the Borrower, then, during such time as such rate of interest would be deemed excessive, that portion of each sum paid attributable to that portion of such interest rate that exceeds the maximum rate of interest so permitted shall be deemed a voluntary prepayment of principal.

Borrower may prepay this Note in whole or in part, at any time, without penalty or premium. Any such prepayment shall be credited in the inverse order of their maturity and shall not affect the obligation to pay the regular installments

required hereunder.

All payments and prepayments shall be applied first to the payment of all interest on the unpaid principal of this Note and the balance on account of the principal and all other amounts due under this Note, the Agreement or any Related Agreement (as defined in the Agreement). The Bank is authorized, but not required, to charge any amount due hereunder or under the Agreement or any Related Agreement to any account of the Borrower when and as it becomes due.

Upon the happening of any Event of Default (as defined in the Agreement), the entire indebtedness with accrued interest thereon due under this Note, shall, at the option of the Bank, accelerate and become immediately due and payable without demand or notice of any kind. Failure to exercise such option shall not constitute a waiver of the right to exercise the same in the event of any subsequent default.

This Note has been executed and delivered in accordance with the Agreement, incorporated herein by reference, which contains, among others, terms and conditions upon which the entire unpaid principal hereof and all interest hereon may become due and payable prior to the stated maturity hereof and provisions as to further rights of the Bank and duties of the Borrower and any Guarantor (as defined in the Agreement) with respect hereto. This Note is secured by collateral as further described in certain of the Related Agreements.

The Borrower agrees to pay all taxes levied or assessed upon the outstanding principal against any holder of this Note and to pay all costs, including attorneys' fees and all other costs and expenses incurred in the collection, protection, preservation, defense, administration or enforcement of this Note or any guaranty or endorsement of this Note or in any litigation arising out of the transactions of which this Note or

any guaranty or endorsement of this Note is a part.

The Borrower hereby gives the Bank a lien and right of set off for all of Borrower's liabilities and obligations upon and against all the deposits, credits, collateral and property of the Borrower, now or hereafter in the possession, custody, safekeeping or control of the Bank. At any time, without demand or notice, Bank may set off the same or any part thereof and apply the same to any liability or obligation of the Borrower even though unmatured.

THE BANK AND THE BORROWER IRREVOCABLY WAIVE ALL RIGHT TO A TRIAL BY JURY IN ANY PROCEEDING HEREAFTER INSTITUTED BY OR AGAINST THE BANK OR THE BORROWER IN RESPECT OF THIS NOTE OR ARISING OUT OF ANY DOCUMENT, INSTRUMENT OR AGREEMENT EVIDENCING, GOVERNING OR SECURING THIS NOTE, INCLUDING THE AFORESAID AGREEMENT.

BORROWER (1) ACKNOWLEDGES THAT THE LOAN EVIDENCED BY THIS NOTE IS PART OF A COMMERCIAL TRANSACTION AND (2) TO THE EXTENT PERMITTED BY ANY STATE OR FEDERAL LAW, WAIVES THE RIGHT BORROWER MAY HAVE TO PRIOR NOTICE OF AND A HEARING ON THE RIGHT OF ANY HOLDER OF THIS NOTE TO ANY REMEDY OR COMBINATION OF REMEDIES THAT ENABLES SAID HOLDER, BY WAY OF ATTACHMENT, FOREIGN ATTACHMENT, GARNISHMENT OR REPLEVIN, TO DEPRIVE BORROWER OF ANY OF BORROWER'S PROPERTY, AT ANY TIME, PRIOR TO FINAL JUDGMENT IN ANY LITIGATION INSTITUTED IN CONNECTION WITH THIS NOTE. The Borrower further waives diligence, demand, presentment for payment, notice of nonpayment, protest and notice of protest, and notice of any renewals or extensions of this Note, and all rights under any statute of limitations, and agrees that the time for payment of this Note may be changed and extended at Bank's sole discretion, without impairing borrower's liability hereon, and

further consents to the release of all or any part of the security for the payment hereof at the discretion of Bank, or the release of any party liable for this obligation without affecting the liability of the other parties hereto. Any delay on the part of the Bank in exercising any right hereunder shall not operate as a waiver of any such right, and any waiver granted for one occasion shall not operate as a waiver in the event of any subsequent default.

This Note shall bind the heirs, executors, administrators, successors and assigns of Borrower and shall inure to the benefit of the Bank, its successors and assigns.

This Note is executed as a sealed instrument and shall be governed by and construed in accordance with the laws of the Commonwealth of Massachusetts.

Witness: Borrower

_____ _____

By:
Its:

GUARANTY

GUARANTY

TO: _____

_____, Massachusetts

DATE: _____

To induce you to make or continue to make loans or advances, or grant other financial accommodations to _____ ("Borrower"), pursuant to a Promissory Note in the amount of $_____, a Loan Agreement, and a Mortgage and Security Agreement, all of even date herewith, and all other documents executed therewith now or in the future including any amendments, modifications, renewals, substitutions or extensions thereto ("Loan Documents") and in consideration thereof and for loans, advances or financial accommodations heretofore or hereafter granted by you to or for the account of the Borrower, whether pursuant to said Loan Documents, or otherwise, and acknowledging that such loans, advances or financial accommodations will be to the direct interest, advantage and benefit of the undersigned (the "Guarantor"), the Guarantor guarantees the payment to you of all sums which may be presently due and owing and of all sums which shall in the

future become due and owing to you from the Borrower, whether under said Loan Documents or otherwise and also guarantees the due performance by the Borrower of all its obligations under said Loan Documents and under all other present and future contracts and agreements with you.

The Guarantor agrees: that the liability of the Guarantor hereunder is absolute, direct and unconditional and may be enforced without requiring you first to resort to any other right, remedy or security; that if the Borrower or the Guarantor should at any time become insolvent or make a general assignment on behalf of creditor(s), or if a petition in bankruptcy or any insolvency or reorganization proceedings shall be filed or commenced by, against, or in respect of the Borrower or the Guarantor, any and all obligations of the Guarantor shall, at your option, forthwith become due and payable without notice.

The Guarantor agrees that this Guaranty shall remain in full force and effect until such time as all obligations of the Borrower under the Loan Documents have been satisfied in full; that nothing shall discharge or satisfy the liability of the Guarantor hereunder except the full payment and performance of all of the Borrower's debts and obligations to you with interest; that the liability of the Guarantor hereunder shall not be terminated or otherwise affected or impaired by any substitution, exchange, modification, or release of collateral or security for any obligations hereby guaranteed, whether or not notice thereof shall have been given to the Guarantor, or by failure on your part to take any action with respect to or to realize upon any security, rights, endorsements or guaranties which you may now or hereafter hold with respect to obligations guaranteed hereunder, or by any change with respect to the Borrower in the form or manner of doing business.

The undersigned Guarantor waives notice of acceptance, presentment and protest of any instrument, and notice thereof, notice of default, and all other notices to which such Guarantor might otherwise be entitled.

This Guaranty, all acts and transactions hereunder, and the rights and obligations of the parties hereto shall be governed, construed and interpreted according to the laws of the Commonwealth of Massachusetts, shall be binding upon the heirs, executors, administrators, successors and assigns of the Guarantor and shall inure to the benefit of your successors and assigns.

This Guaranty shall take effect as a sealed instrument as of the date first written above.

Guarantor:

_____

_____

COMMONWEALTH OF MASSACHUSETTS

_____,ss

On this ____ day of _____, _____, before me, the undersigned Notary Public, personally appeared _____, who proved to me through satisfactory evidence of identification, which was

_____

___, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he signed it voluntarily for its stated purpose.

_____

(Official Signature and Seal of Notary)

MORTGAGE

MORTGAGE

THIS MORTGAGE ("Security Instrument") is given on , 20 . The mortgagor is _____ (collectively or singularly, as the case may be, "Mortgagor"). This Security Instrument is given to _____, which is organized and existing under the laws of the United States of America, and whose principal place of business is _____ ("Mortgagee"). Mortgagor is executing and delivering to Mortgagee: Mortgagor's Promissory Note dated the date hereof, in the original principal amount of $ _____, payable to Mortgagee.

All obligations, covenants and agreements of Mortgagor now existing or hereafter arising under the foregoing instrument(s) executed and delivered by Mortgagor to Mortgagee, together with any and all extensions, renewals, substitutions, modifications or replacements thereof (collectively or singularly, as the case may be, the "Debt Instrument"), whether such obligations be direct or indirect, absolute or contingent, or due or to become due, and all obligations of Mortgagor under this Security Instrument, including without limitation, all obligations of the Mortgagor in respect of any amounts disbursed by Mortgagee pursuant to paragraph 5 hereof, are hereinafter referred to collectively

as the "Obligations." The Obligations may include future advances which will be advanced from time to time under the Debt Instrument or under the note or agreement guaranteed by the Debt Instrument, as the case may be, from and after the date hereof and may include readvances of amounts repaid. This Security Instrument secures the Obligations. For this purpose, Mortgagor does hereby mortgage, grant and convey to Mortgagee, WITH MORTGAGE COVENANTS, the property located in _____ County, Massachusetts, and described in EXHIBIT A,annexed, which has the address of

_____

_____

_____("Property Address").

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, rights appurtenances, rents, royalties, mineral, oil and gas rights and profits, water rights and stock and all fixtures now or hereafter a part of the property. All replacements and additions shall be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property."

MORTGAGOR COVENANTS that Mortgagor is lawfully seised of the estate hereby conveyed and has the right to mortgage, grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Mortgagor warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record. This Mortgage is made upon the STATUTORY CONDITION.

1. Payment and Performance of Obligations. Mortgagor shall promptly pay and perform the Obligations when due to be paid or performed.

2. Prior Mortgages; Charges; Liens. Mortgagor shall

pay and perform all of Mortgagor's obligations under any mortgage or other security agreement with a lien which has priority over this Security Instrument, and shall pay all taxes, assessments, charges, fines and impositions attributable to the Property which may attain priority over this Security Instrument, and leasehold payments or ground rents, if any. Mortgagor shall pay and perform these obligations on time directly to the person owed payment or performance. Upon Mortgagee's request, Mortgagor shall promptly furnish to Mortgagee receipts evidencing the payments.

Mortgagor shall promptly discharge any lien which obtains priority over this Security Instrument after the date of this Security Instrument unless Mortgagor: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Mortgagee; (b) contests in good faith the lien by, or defends against enforcement of the lien in, legal proceedings which in the Mortgagee's opinion operate to prevent the enforcement of the lien or forfeiture of any part of the Property; or (c) secures from the holder of the lien an agreement satisfactory to Mortgagee subordinating the lien to this Security Instrument. If Mortgagee determines that any part of the Property is subject to such a lien, Mortgagee may give Mortgagor a notice identifying the lien. Mortgagor shall satisfy the lien or take one or more of the actions set forth above within 10 days of the giving of notice.

3. Hazard Insurance. Mortgagor shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage" and any other hazards, including floods or flooding, for which Mortgagee requires insurance. This insurance shall be maintained in the amounts and for the periods that Mortgagee requires. The insurance carrier providing the insurance shall be chosen by Mortgagor subject to Mortgagee's approval which shall not be

unreasonably withheld.

All insurance policies and renewals shall be acceptable to Mortgagee and shall include a standard mortgage clause naming Mortgagee as its interest may appear. Mortgagee shall have the right to hold the policies and renewals. If Mortgagee requires, Mortgagor shall promptly give to Mortgagee all receipts of paid premiums and renewal notices. In the event of loss, Mortgagor shall give prompt notice to the insurance carrier and Mortgagee, Mortgagee may make proof of loss if not made promptly by Mortgagor.

Unless Mortgagee and Mortgagor otherwise agree in writing and provided that no breach of any covenant or agreement in this Security Instrument or the Debt Instrument exists, insurance proceeds shall be applied to restoration or repair of the Property damages, if the restoration or repair is economically feasible and Mortgagee's security is not lessened. If a breach of any covenant or agreement in this Security Instrument or the Debt Instrument exists or the restoration or repair is not economically feasible or Mortgagee's security would be lessened, the insurance proceeds, subject to the rights of any prior mortgagee, shall be applied to the sums secured by this Security Instrument, whether or not then due, with any excess paid to Mortgagor. If Mortgagor abandons the Property, or does not answer within 30 days a notice from Mortgagee that the insurance carrier has offered to settle a claim, then Mortgagee may collect the insurance proceeds. Mortgagee may use the proceeds to repair or restore the Property or to pay sums secured by this Security Instrument, whether or not then due. The 30-day period will begin when the notice is given.

Unless Mortgagee and Mortgagor otherwise agree in writing, any application of proceeds to principal shall not extend or postpone the due date of any of the Obligations or change the amount of the Obligations. If under paragraph 15

the Property is acquired by Mortgagee, Mortgagor's right to any insurance policies and proceeds resulting from damage to the Property prior to the acquisition shall pass to Mortgagee to the extent of the sums secured by this Security Instrument immediately prior to the acquisition.

4. Preservation and Maintenance of Property; Leaseholds. Mortgagor shall not destroy, damage or substantially change the Property, allow the Property to deteriorate or commit waste. If this Security Instrument is a leasehold, Mortgagor shall comply with the provisions of the lease, and if Mortgagor acquires fee title to the Property, the leasehold and fee title shall not merge unless Mortgagee agrees to the merger in writing.

5. Protection of Mortgagee's Rights in the Property. If Mortgagor fails to perform the covenants and agreements contained in this Security Instrument, or there is a legal proceeding that may significantly affect Mortgagee's rights in the Property (such a proceeding in bankruptcy, probate, for condemnation or to enforce laws or regulations), then Mortgagee may do and pay for whatever is necessary to protect the value of the Property and Mortgagee's rights in the Property. Mortgagee's actions may include paying any sums secured by a lien which has priority over this Security Instrument, obtaining hazard insurance or any other insurance required hereunder and paying premiums therefor, appearing in court, paying reasonable attorneys' fees and entering on the Property to make repairs. Although Mortgagee may take action under this paragraph 5, Mortgagee does not have to do so.

Any amounts disbursed by Mortgagee under this paragraph 5 shall become additional debt of Mortgagor and part of the Obligations secured by this Security Instrument. Unless Mortgagor and Mortgagee agree to other terms of payment, these amounts shall bear interest from the date of

disbursement at the rate provided in the Debt Instrument, or in the note or agreement guaranteed by the Debt Instrument, as the case may be, and shall be payable, with interest, upon notice from Mortgagee to Mortgagor requesting payment.

6. Inspection. Mortgagee or its agent may make reasonable entries upon and inspections of Property. Mortgagee shall give Mortgagor notice at the time of or prior to an inspection specifying reasonable cause for the inspection.

7. Condemnation. The proceeds of any award or claim for damages, direct or consequential, in connection with any condemnation or taking of any part of the Property, or for conveyance in lieu of condemnation, are hereby assigned and shall be paid to Mortgagee, subject to the rights of prior mortgagees.

In the event of a total or partial taking of the Property, the proceeds, subject to the rights of prior mortgagees, shall be applied to the sums secured by this Security Instrument, whether or not then due, with any excess paid to Mortgagor.

If the Property is abandoned by Mortgagor, or if, after notice by Mortgagee to Mortgagor that the condemnor has offered to make an award or settle a claim for damages, Mortgagor fails to respond to Mortgagee within 30 days after the date the notice is given, Mortgagee is authorized to collect and apply the proceeds, at its option, either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due.

Unless Mortgagee and Mortgagor otherwise agree in writing, any application of proceeds to the payment of the Obligations shall not extend or postpone the due date of any of the Obligations or change the amount of any payments.

8. Mortgagor Not Released; Forbearance by Mortgagee

Not a Waiver. Extension of the time for payment or modification or amortization of the sums secured by this Security Instrument granted by Mortgagee to any successor in interest of Mortgagor shall not operate to release the liability of the original Mortgagor or Mortgagor's successors in interest. Mortgagee shall not be required to commence proceedings against any successor in interest or refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Mortgagor or Mortgagor's successors in interest. Any forbearance by Mortgagee in exercising any right or remedy shall not be a waiver of or preclude the exercise of any right or remedy.

9. Successors and Assigns Bound; Joint and Several Liability; Co-signers. The covenants and agreements of this Security Instrument shall bind and benefit the successors and assigns of Mortgagee and Mortgagor, subject to the provisions of paragraph 14. Mortgagor's covenants and agreements shall be joint and several. Any Mortgagor who co-signs this Security Instrument but does not execute the Debt Instrument: (a) is co-signing this Security Instrument only to mortgage, grant and convey that Mortgagor's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Mortgagee and any other Mortgagor may agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Debt Instrument without that Mortgagor's consent and, at Mortgagee's request, to join in the execution of any modification of this Security Instrument, the purpose of which is to evidence of record any such extension, modification, forbearance or accommodation.

10. Loan Charges. If the Obligations secured by this Security Instrument are subject to a law which sets maximum

loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Obligations exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Mortgagor which exceeded permitted limits will be refunded to Mortgagor. Mortgagee may choose to make this refund by reducing the principal owed under the Debt Instrument or by making a direct payment to Mortgagor. If a refund reduces principal, the reduction will be treated as a partial payment without any prepayment charge under the Debt Instrument.

11. Notices. Any notice to Mortgagor provided for in this Security Instrument shall be given by delivering it or by mailing it by certified mail, return receipt requested, unless applicable law requires use of another method. The notice shall be directed to the Property Address or any other address Mortgagor designates by notice to Mortgagee. Any notice to Mortgagee shall be given by certified mail, return receipt requested, to the following address or any other address Mortgagee designates by notice to Mortgagor:

_____

_____. Any notice provided for in this Security Instrument shall be deemed to have been given to Mortgagor or Mortgagee when given as provided in this paragraph 12.

12. Governing Law; Severability. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. In the event that any provision or clause of this Security Instrument or the Debt Instrument conflicts with applicable law, such conflict shall not affect other provisions of this Security Instrument or the Debt Instrument which can be given effect without the conflicting provision. To this end, the provisions of this

Security Instrument and the Debt Instrument are declared to be severable.

13. Transfer of the Property or a Beneficial Interest in Mortgagor. If all or any part of the Property or any interest in it is sold, transferred (or if a beneficial interest in Mortgagor is sold or transferred and Mortgagor is not a natural person), mortgaged or otherwise encumbered without Mortgagee's prior written consent, Mortgagee may, at its option, require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Mortgagee if exercise is prohibited by federal law as of the date of this Security Instrument.

14. Acceleration; Remedies. Upon the occurrence of a default in the payment and performance when due of all or any portion of the Obligations or breach of any covenant or agreement in the Debt Instrument or this Security Instrument or the occurrence of any event specified in Paragraph 11 or any Event of Default under the Debt Instrument, Mortgagee may, at its option, (a) declare all of the Obligations to be immediately due and payable, whereupon the same shall become immediately due and payable, without presentment or demand for payment, notice or demand of any kind, all of which are hereby waived by Mortgagor and (b) invoke the STATUTORY POWER OF SALE and any other remedies permitted under the Debt Instrument or by applicable law. Mortgagee shall be entitled to collect all expenses incurred in pursuing the remedies provided in this paragraph 15, including, but not limited to, reasonable attorney's fees and costs of title evidence.

If Mortgagee invokes the STATUTORY POWER OF SALE, Mortgagee shall mail a copy of a notice of sale to Mortgagor, and to other persons prescribed by applicable law, in the manner provided by applicable law. Mortgagee shall publish

the notice of sale, and the Property shall be sold in the manner prescribed by applicable law. Mortgagee or its designee may purchase the Property at any sale. The proceeds of the sale shall be applied in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable attorney's fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it.

15. Mortgagee in Possession. Upon acceleration under paragraph 15 or abandonment of the Property, Mortgagee (in person, by agent or by judicially appointed receiver) shall be entitled to enter upon, take possession of and manage the Property and to collect the rents of the Property including those past due. Any rents collected by Mortgagee or the receiver shall be applied first to payment of the costs of management of the Property and collection of rents, including, but not limited to, receiver's fees, premiums on receiver's bonds and reasonable attorney's fees, and then to the sums secured by this Security Instrument.

16. Release. Upon payment of all sums secured by this Security Instrument, Mortgagee shall discharge this Security Instrument without charge to Mortgagor. Mortgagor shall pay any recordation costs.

17. Waivers. Mortgagor waives all rights of homestead exemption in the Property and relinquishes all rights of curtesy and dower in the Property.

18. Riders to this Security Instrument. If one or more riders are executed by Mortgagor and recorded together with this Security Instrument, the covenants and agreements of each such rider shall be incorporated into and shall amend and supplement the covenants and agreements of this Security Instrument as if the rider(s) were a part of this Security Instrument.

BY SIGNING BELOW, Mortgagor accepts and agrees

to the terms and covenants contained in this Security Instrument and in any rider(s) executed by Mortgagor and recorded with it.

Mortgagor:

_____

By:
Its:

COMMONWEALTH OF MASSACHUSETTS

_____,ss

On this ____ day of _____, _____, before me, the undersigned Notary Public, personally appeared _____, who proved to me through satisfactory evidence of identification, which was

_____

___, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he signed it voluntarily for its stated purpose.

_____

(Official Signature and Seal of Notary)

ASSIGNMENT OF RENTS AND LEASES

ASSIGNMENT OF LEASES AND RENTS

This Assignment of Leases and Rents (this "Assignment") is made by _____, a _____ with a principal office at _____ ("Borrower"), in favor of _____, a Massachusetts _____ with offices at _____ ("Lender").

Background

This Assignment is made to secure Borrower's payment and performance of all of Borrower's obligations to Lender in connection with (a) the indebtedness evidenced by Borrower's Promissory Note to Lender dated of even date herewith in the face amount of $_____ (the "Note"), (b) a first mortgage and security agreement dated of even date and recorded herewith, covering certain real property at _____ in _____, _____ County, Massachusetts, as more particularly described on the attached Exhibit A (the "Premises"), (c) any other present or future notes, mortgages, guarantees, assignments or agreements between Borrower

and Lender in connection with the foregoing obligations, (d) any substitutions or replacements for any of the foregoing, and (e) any extensions, renewals, restatements, amendments or modifications thereof (collectively, the "Obligations").

Agreements

As further security for Borrower's payment and performance of the Obligations, Borrower agrees with Lender as follows:

1. Subject to the terms and conditions of this Assignment, Borrower hereby transfers, assigns, and delivers to Lender as security for Borrower's payment and performance of the Obligations all of Borrower's right, title, and interest in and to:

(i) All present and future leases, occupancy agreements, and tenancies with respect to the Premises, together with all renewals, extensions, and modifications thereof (collectively, "Leases");

(ii) All rents and other payments due to Borrower by virtue of the Leases or otherwise due to Borrower as the result of any use, possession, or occupancy of any portion or portions of the Premises (collectively, "Rents"); and

(iii) All right, title, and interest of Borrower in and to all guarantees of the Leases.

2. Borrower authorizes and empowers Lender to collect the Rents as they become due and irrevocably directs each of the present and future lessees, tenants, and other occupants of the Premises (all collectively "Tenants") to pay the Rents to Lender, upon demand by Lender, provided, however, that no such demand shall be made by Lender unless and until there shall have occurred and is continuing an Event of Default, as defined in the Note (an "Event of Default"). Until

then, Borrower shall have a license to collect the Rents.

3. Borrower agrees that Lender may exercise its rights under this Assignment without taking actual or constructive possession of the Premises.

4. Effective as of the occurrence of an Event of Default, Borrower irrevocably constitutes and appoints Lender as Borrower's true and lawful attorney in fact, with full power of substitution, for Borrower and in Borrower's name, place, and stead, to enter and take possession of the Premises and to do and perform any or all of the following actions, as fully as Borrower could do if personally present, hereby ratifying and confirming all that Lender lawfully does or causes to be done by virtue of the foregoing appointment:

(a) To manage and operate the Premises or any part of the Premises;

(b) To lease any or all of the Premises for such periods of time, and upon such terms and conditions, as Lender in its sole discretion decides advisable;

(c) To enforce, terminate, or modify any of the Leases;

(d) To enter into subordination, attornment, and nondisturbance agreements with respect to any mortgages, deeds, or leases of the Premises (including any mortgages held by Lender) or with any of the Tenants;

(e) To demand, collect, sue for, attach, levy, recover, receive, compromise and adjust, and make, execute, and deliver receipts, releases, and discharges for the Rents;

(f) To institute, prosecute to completion, or compromise and settle, all proceedings and actions for Rent or for eviction of any Tenant;

(g) To enforce, enjoin, or restrain the violation

of any of the terms, provisions, and conditions of any of the Leases;

(h) To make such repairs and alterations to the Premises as Lender in its reasonable discretion decides advisable;

(i) To pay from the Rents any taxes, assessments, water rates, sewer rates, or other governmental charges levied, assessed, or imposed against the Premises or any portion thereof, and also any and all other charges, costs, and expenses which it may be necessary or advisable for Lender to pay in the management or operation of the Premises, including brokerage commissions, management and consulting fees, and reasonable legal fees; and

(j) Generally to do any other thing whatsoever that Lender in good faith decides advisable with respect to the Premises, as fully as Borrower might do, provided, however, that (i) to the extent permitted by law this Assignment shall not operate to place upon Lender any responsibility or obligation to take any action whatsoever with respect to the operation, control, care, management, or repair of the Premises, and (ii) any action or failure or refusal to act by Lender under this Assignment, except to the extent attributable to Lender's willful or intentional misconduct or gross negligence, shall be without any liability on its part.

5. Borrower represents and warrants to Lender as follows:

(a) Borrower is the sole owner of the entire landlord's interest in the Leases, true and complete copies of which have been delivered to Lender;

(b) The Leases are valid and enforceable, are in full force and effect, and have not been altered, amended, or modified in any manner, except for such amendments as are included with the copies of Leases delivered by Borrower to

Lender;

(c) Except for security deposits and last month's rent paid by Tenants, no set-off or counterclaim exists under the Leases against Borrower, and except as previously disclosed in writing to Lender, to Borrower's knowledge, no party to any of the Leases is in default thereunder, nor does any basis for such a default exist;

(d) Borrower has not previously sold, assigned, transferred, mortgaged, or pledged any of the Leases or any of the Rents other than with respect to the Subordinate Loans (as defined in the Loan Agreement); and

(e) No Rents becoming due after the date of this Assignment have been collected, nor has payment of any of the Rents been anticipated, waived, released, discounted, or otherwise discharged or compromised.

6. Borrower covenants and agrees with Lender as follows:

(a) Except for any assignments in connection with Subordinate Loans, Borrower will not further assign, pledge, or otherwise transfer or encumber any of the Leases or any of the Rents without the prior written consent of Lender and unless the instrument creating such assignment, pledge, or encumbrance expressly states that it is subject and subordinate to this Assignment;

(b) Borrower will not collect or receive from any Tenant more than one (1) month's rent in advance of the rent stipulated to be paid under the applicable lease, except for security deposits and last month's rent, without in each case having obtained the prior written consent of Lender;

(c) Borrower will perform and observe, or cause to be performed and observed, all of the terms, covenants, and conditions on Borrower's part to be performed and observed

with respect to each of the Leases;

(d) Upon written request by Lender, Borrower will serve upon any Tenant or include among the written provisions of any Lease a specific reference to this Assignment;

(e) Borrower will promptly furnish to Lender, on demand, true copies of all Leases executed after the date of this Assignment and true copies of each agreement or letter affecting the renewal, amendment, or modification of any Lease;

(f) Borrower will not enter into any agreement with any management agent or firm with respect to the Premises unless such agent or firm first agrees with Lender to recognize Lender's rights under this Assignment and further agrees to transfer all Rents received by such agent or firm directly to Lender upon Lender's demand after an Event of Default; and

(g) No lease of the Premises outside the ordinary course of business shall be executed by Borrower without Lender's prior express written approval.

7. Except to the extent attributable to Lender's willful misconduct or gross negligence, Borrower shall indemnify and hold Lender harmless (a) against and from any and all liability, loss, damage, and expense, including reasonable attorneys' fees, which it may incur under or in connection with any of the Leases, or by reason of any action taken or expenses paid or incurred by Lender under this Assignment and (b) against and from any and all liability, loss, damage, and expense, including reasonable attorneys' fees, incurred by Lender in connection with any claim or demand whatsoever that may be asserted against Lender by reason of any alleged obligation or undertaking on its part to perform or discharge any of the terms, covenants, or conditions in any of the Leases. Should Lender pay or incur any such liability, loss, damage,

or expense, the amount thereof, together with interest at the Default Rate as defined in the Note shall be payable by Borrower to Lender within ten (10) business days after Lender's written demand. At its option, Lender may reimburse itself from any Rents which it has collected.

8. Failure of Lender to avail itself of any of the terms, covenants, and conditions of this Assignment shall not be construed as a waiver of any of its rights. The rights and remedies of Lender under this Assignment are cumulative and are not in lieu of, but are in addition to, any other rights and remedies which Lender shall have under or by virtue of any of the other Obligations. Borrower recognizes and agrees that if any of the Leases is subordinate to the mortgage, Lender may at its election extinguish such leases in accordance with applicable law through the exercise of its rights as Lender, regardless of whether Lender previously has exercised its rights under this Assignment.

9. Upon the payment and performance in full of all of the Obligations this Assignment shall terminate and Lender shall execute and deliver to Borrower at Borrower's expense any instruments necessary to discharge this Assignment of record.

10. All terms, covenants, agreements, and conditions in this Assignment shall inure to the benefit of and be binding upon Borrower and Lender and their respective successors and assigns and may not be terminated, modified, changed, or amended except in writing signed by all parties hereto. Any notice, demand, or other communication shall be rendered in writing and shall be delivered in accordance with the notice provision in the Loan Agreement. If any one or more of the provisions in this Assignment are held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision.

Signed as a sealed instrument as of September __, 2005.

Borrower:

_____

By:
Its:

COMMONWEALTH OF MASSACHUSETTS

_____,ss

On this ____ day of _____, _____, before me, the undersigned Notary Public, personally appeared _____, who proved to me through satisfactory evidence of identification, which was _____ ___, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he signed it voluntarily for its stated purpose.

_____

(Official Signature and Seal of Notary)

CONSTRUCTION LOAN AGREEMENT

CONSTRUCTION LOAN AGREEMENT

THIS CONSTRUCTION LOAN AGREEMENT (this "Agreement") is dated as of the ____ day of _____, by and among _____, a Massachusetts limited liability company ("_____"), and _____, a Massachusetts limited liability company ("_____"), both having a usual place of business at _____, _____, _____ _____ (collectively with their respective successors and assigns, the "Borrower"), _____, in his individual capacity, _____, a New York limited liability company and _____, a New York limited liability company all having an address at _____, _____, _____ _____ (collectively with their respective successors and assigns, the individual guarantor is hereinafter referred to as the "Individual Guarantor" and the remaining guarantors, the "LLC Guarantors"; together, the Individual Guarantor and the LLC Guarantors are hereinafter referred to collectively as the "Guarantors") and _____, having a usual place of business at _____, _____,

_____ _____ (together with its successors and/or assigns, the "Bank").

This Agreement sets forth the agreements, rights and obligations of the parties in connection with Bank's commitment under the terms and conditions set forth herein and in that certain commitment letter dated _____ from the Bank to the Borrower and the Guarantors (together with any and all amendments thereto, the "Commitment Letter") to make a certain _____ and 00/100 Dollars ($_____) mortgage loan (the "Loan") to the Borrower, the proceeds of which Loan will be used by the Borrower to finance the hard and soft costs incurred by the Borrower in connection with the construction of a _____, all as more particularly described on the Plans and Specifications previously delivered to the Bank and listed on **Exhibit A** attached hereto and made part hereof (the "Project"). The Project is to be constructed on those certain parcels of real property containing approximately _____and, with the improvements thereon, located at _____, all in _____, _____ and more particularly described in **Exhibit B** attached hereto and made part hereof (collectively, the "Land") (together, the Land and the improvements currently existing thereon (the "Improvements") are referred to herein as the "Mortgaged Premises");

The parties hereto agree as follows:

1. LOAN.

   1.1 Amount of Loan. The Bank agrees to lend and the Borrower agrees to borrow up to the principal sum of _____ and 00/100 Dollars ($_____) (the "Loan Commitment"), such amount to be advanced subject to and on the terms and conditions set forth in this Agreement and the Note.

The Bank's obligation to make advances of the Loan (each an "Advance" and together the "Advances") shall commence on the date hereof and shall terminate upon Stabilization, defined below. The Borrower may request from time to time Advances to pay the Borrower's costs of construction of the Improvements in the line item amounts described in **Exhibit C**.

1.2 Note. The Loan shall be evidenced by and repayable with interest in accordance with the terms of a certain Promissory Note (as the same may be amended, restated or modified from time to time, the "Note") made by the Borrower and payable to the order of the Bank in the maximum principal amount of the Loan Commitment and dated of even date herewith. The Note shall provide that the entire outstanding balance of the Loan shall be due and payable in full on the Maturity Date (as defined in the Note) if not sooner accelerated upon the occurrence of an Event of Default.

1.3 Definitions.

"Approved Leases" means all leases approved by the Bank in its reasonable discretion created on a lease form which is substantially similar to the lease form which has been approved by the Bank, and all leases which do not meet the foregoing criteria but have nevertheless been approved by the Bank;

"Bank's Consultant" means a construction consultant selected by the Bank in the exercise of its sole discretion;

"Debt Coverage Interest Rates" means the fixed rates of interest per annum then applicable to Tranche I and Tranche II (both as defined in the Note), on the Stabilization Date.

"Debt Service Coverage Ratio" means, as of any

given date, the ratio of (a) the annualized Net Operating Income, as defined below, generated by the Improvements over (b) the projected annualized debt service required under the Loan, assuming a twenty (20) year amortization of Tranche I and a five (5) year amortization of Tranche II and the respective interest rates equal to the Debt Coverage Interest Rates for each of Tranche I and Tranche II.

"Leasehold Interest" means the leasehold interest of _____in that portion of the Mortgaged Premises leased to _____pursuant to the terms of that certain Commercial Lease, dated _____, between _____and _____, as amended by that certain Amendment to Lease dated _____, and by that certain Restated Amendment to Lease dated effective as of _____.

"Legal Requirements" means all applicable Federal, state and local laws, statutes, ordinances, rules and regulations and all restrictive covenants affecting the Project and the Mortgaged Premises.

"LSP" means _____, Professional Engineer and Licensed Site Professional, of _____.

"Net Operating Income" means the difference of (a) the aggregate income from rents, revenues, issues, profits and other sources received by the Borrower on account of the Mortgaged Premises plus depreciation cost and interest expense, less (b) the aggregate operating expenses for the Mortgaged Premises, all as reflected on the Borrower's financial statements submitted periodically to the Bank. Income and expenses used to calculate Net Operating Income shall exclude nonrecurring and extraordinary income and expenses.

"Project" means the construction of a

_____ on the Land, all as more particularly described on the Plans and Specifications previously delivered to the Bank.

"Stabilization" means the earlier to occur of (a) completion of construction of the Improvements, lien free with the City of _____ having issued a permanent unconditional Certificate of Occupancy for the building; and (b) the expiration of nine (9) months from the date hereof.

1.4 Commitment Fee. The Borrower agrees to pay to the Bank a nonrefundable commitment fee (the "Commitment Fee") in the amount of _____ and 00/100 Dollars ($_____), payable contemporaneously with the execution of the Loan Documents. The Commitment Fee is to compensate the Bank for processing the Borrower's application and committing the funds of the Loan for the period of the loan and shall be fully earned upon the execution of this Agreement by the Bank.

1.5 Use of Loan Proceeds. The proceeds of the Loan shall be used for the purposes set forth in the preamble to this Agreement. The Borrower agrees that the Bank may, at the Bank's election after an Event of Default, use the unadvanced proceeds of the Loan to pay the interest then due under the Note directly to the Bank, but such right of the Bank shall not limit in any way the Borrower's obligations to make timely payments under the Note.

1.6 Security For Loan. The Loan shall be secured or guaranteed by, inter alia, the following instruments:

(a) The Mortgage, Security Agreement and Assignment of Leases and Rents (the "Fee Mortgage"), from the Borrower to the Bank dated of even date herewith,

encumbering that portion of the Mortgaged Premises owned by _____, and the personal property located thereon and used in connection therewith;

(b) [Intentionally omitted.];

(c) The Assignment of Leases and Rents (the "Assignment of Leases"), from the Borrower to the Bank dated of even date herewith, assigning the Borrower's interest as landlord in all Leases, as defined below, of the Mortgaged Premises;

(d) [Intentionally omitted.];

(e) The Omnibus Assignment of Permits, Contracts, Plans, Approvals, Licenses, Warranties and Other Agreements (the "Assignment of Permits") from the Borrower to the Bank dated of even date herewith, assigning the Borrower's interests in all licenses, the Architect's Contract, the Construction Contract, the Plans and Specifications and permits, certificates of occupancy and similar documents or instruments related to the Mortgaged Premises;

(f) The Contractor's Consent to the assignment to the Bank of the Construction Contract between _____ (the "General Contractor" and the Borrower), as such term is defined in the Assignment of Permits, such consent being referred to as a "Site Professional Consent";

(g) The Architect's Consent to the assignment to the Bank of the Architect's Contract between _____ (the "Project Architect" and the Borrower), as such term is defined in the Assignment of Permits, such consent being referred to as a "Site Professional Consent";

(h) The Engineer's Consent to the assignment to the

Bank of the Contract between _____ (the "Site Engineer") and the Borrower, such consent being referred to as a "Site Professional Consent";

(i) The Engineer's Consent to the assignment to the Bank of the Contract between _____ (the "Project Engineer") and the Borrower, such consent being referred to as a "Site Professional Consent";

(j) The LSP Consent to the assignment to the Bank of the Contract between _____ and the Borrower, such consent being referred to as a "Site Professional Consent";

(k) The Transaction Guaranty (the "Transaction Guaranty") and the Guaranty of Completion of Improvements (the "Completion Guaranty"), each made by the Guarantors in favor of the Bank dated of even date herewith (the Transaction Guaranty and the Completion Guaranty are sometimes referred to together as the "Guaranties");

(l) UCC-1 Financing Statements ("Financing Statements") evidencing the security interest referred to in Section 1.6(a), (b) and (d) above and Section 1.6(n) below;

(m) The Environmental Indemnity Agreement from the Borrower and the Guarantors to the Bank dated of even date herewith with respect to the Mortgaged Premises (the "Environmental Indemnity Agreement");

(n) The Security Agreement and Assignment of Earnout Advance from Borrower to the Bank dated of even date herewith (the "Security Agreement and Assignment of Earnout Advance") granting a security interest in that certain First Earnout Advance in the

amount of approximately _____ and 00/100 Dollars ($_____)(the "First Earnout Advance"), which First Earnout Advance has been assigned from _____, a _____ limited liability company ("_____"), to the Borrower, pursuant to that certain Assignment of Earnout Advance made by _____ in favor of the Borrower; and

(o) The Blocked Account Agreement between Borrower and Bank dated of even date herewith with respect to the First Earnout Advance (the "Blocked Account Agreement").

This Agreement, the Note, the Fee Mortgage, the Leasehold Mortgage, the Assignment of Leases, the Assignment of Permits, the five Site Professional Consents, the Guaranties, the Financing Statements, the Environmental Indemnity Agreement, the Security Agreement and Assignment of Earnout Advance, the Blocked Account Agreement, and all other documents, instruments and agreements relating to and executed in connection with the Loan, as the same may be amended, restated, replaced, supplemented, extended, substituted, consolidated or otherwise modified from time to time, are collectively referred to as the "Loan Documents."

(p) The Leasehold Mortgage, Security Agreement and Assignment of Leases and Rents (the "Leasehold Mortgage"), from the Borrower to the Bank dated of even date herewith, encumbering _____'s Leasehold Interest, and the personal property located thereon and used in connection therewith;

1.7 Debt Service Coverage Ratio. At all times from the date which is one (1) year after the date of this

Agreement and while the Loan remains outstanding, the Borrower shall maintain a Debt Service Coverage Ratio of no less than 1.50 to 1.00.

2. GUARANTIES. The Guarantors have this day executed and delivered to the Bank the Transaction Guaranty by which the Guarantors have guaranteed the payment and performance of all of the Obligations of the Borrower to the Bank, as that term is defined in the Transaction Guaranty, including, without limitation, the payment and performance of obligations of the Borrower under this Agreement, the Note and the other Loan Documents. In addition, the Guarantors have this day executed and delivered to the Bank the Completion Guaranty by which the Guarantors have guaranteed the completion of the Project and the payment of the costs associated therewith.[Intentionally omitted]

3. REPRESENTATIONS AND WARRANTIES. The Borrower and the Guarantors (but only to the extent of the documents executed by the Guarantors) hereby covenants, represents, warrants and agrees that:

(a) The Individual Guarantor is the sole member of _____ and _____.. [Intentionally omitted]

(b) The Individual Guarantor has the legal capacity to execute, deliver and perform his obligations under each of the Loan Documents to which he is a party. .[Intentionally omitted]

(c) Each Borrower is a limited liability company duly organized and validly existing under the laws of the Commonwealth of Massachusetts. Each of the LLC Guarantors is a limited liability company duly organized and validly existing under the laws of the State of New York and each of the LLC Guarantors is duly qualified, and is in good standing, to do business as a foreign limited

liability company in the Commonwealth of Massachusetts. . [Intentionally omitted]

(d) The Loan Documents, when executed, will be the legal, valid, and binding obligations of the Borrower and the Guarantors, as applicable, enforceable against the Borrower and the Guarantors, as applicable, in accordance with their respective terms. No authorization or approval or other action by, and no notice to or filing with, any court, board, agency, commission, office or authority of any nature whatsoever or any governmental unit (federal, state, county, district, municipal, city or otherwise) (each, a "Governmental Authority," and collectively, "Governmental Authorities") or regulatory body is required for the due execution, delivery and performance or effectiveness of the Loan Documents.

(e) To the best of the Borrower's and the Guarantors' knowledge, the Mortgaged Premises are, in all material respects, in compliance with, and the Project, when constructed and completed, will, in all material respects, comply with, all requirements of all applicable Federal, state and local laws (including ordinances of the city of Boston), statutes, ordinances, rules and regulations and all restrictive covenants affecting the Mortgaged Premises.

(f) There is no agreement to which the Borrower or the Guarantors are a party which in any way prevents the execution or carrying out of the obligations of the Borrower or the Guarantors herein or under the other Loan Documents in any respect.

(g) Each submission by Borrower to Bank of a requisition for an Advance of the Loan shall constitute Borrower's representation and warranty to Bank that: (i) all completed construction is substantially in accordance with the Plans and Specifications; and (ii) all construction and other

costs and expenses for the payment of which Bank has previously advanced funds have in fact been paid.

(h) The financial statements of the Borrower (if any) and the Guarantors which have been furnished to the Bank are true, complete, and correct in all material respects as of the date(s) thereof. Each such statement fairly presents the financial condition of the subject thereof as of the date thereof, and, as of the date hereof, there has been since the date of such statement no material adverse change in the financial condition of the subject thereof.

(i) The Borrower holds legal and equitable title to the Mortgaged Premises and all of the other collateral which is intended to be given as security for the Loan, subject to no rights of others (including, without limitation, any mortgages, leases, conditional sales agreements, title retention agreements, liens or other encumbrances) except as listed on **Schedule 3(j)** attached hereto (the "Permitted Encumbrances").

(j) To the best of Borrower's and Guarantors' knowledge, as of the date hereof, there are no actions, suits, or proceedings pending or threatened, which might adversely affect the Mortgaged Premises, the Project, or the financial condition of the Borrower or the Guarantors or which might impair the value of any collateral taken or to be taken by the Bank in connection with the Loan and/or this Agreement. None of the Borrower nor the Guarantors is is not in violation of any agreement, the violation of which might reasonably be expected to have a material adverse effect on any of the Borrower's or any Guarantor's business or assets, nor is either Borrower or any Guarantor in violation of any order, judgment, or decree of any court, or any statute or governmental regulation to which either Borrower, any Guarantor, the Borrower's respective assets, the Mortgaged Premises and/or the Improvements are subject except as

set forth in the Environmental Report. The performance of this Agreement, the Mortgage, the Leasehold Mortgage, the Note, the Guaranties and the other Loan Documents will not result in any breach of any other mortgage, lease, credit or loan agreement, or other instrument which may bind or affect either Borrower, or any Guarantor, the Borrower's respective assets, or the Mortgaged Premises, the Project or the Improvements.

(k) The Borrower intends to use and shall use the proceeds of the Loan for the purposes set forth in Section 1.5 above. Borrower is not engaged in the business of extending credit for the purpose of purchasing or carrying any "margin security" or "margin stock" (as such terms are used in Regulations U and X of the Board of Governors of the Federal Reserve System, 12 C.F.R. Parts 221 and 224), and no portion of the Loan shall be used for the purpose of purchasing or carrying any margin security or margin stock or to extend credit to others for the purpose of purchasing or carrying any margin security or margin stock.

(l) Except as set forth on **Schedule 3(m)** annexed hereto and made a part hereof, the Borrower has provided the Bank with copies of all Leases and all other Material Property Agreements, as defined below. As used herein, "Property Agreements" means all Leases and any and all other agreements affecting or to which the Borrower is party relating to the use, renovation, operation, construction, design or management of the Mortgaged Premises or the Project including, without limitation, management agreements, operating agreements, transportation agreements, rail access agreements, licenses, service agreements and labor union contracts. Material Property Agreement" means any Property Agreement providing for aggregate payments in excess of $50,000.

(m) As of the date of this Agreement, there is no lease, license, concession or other agreement (a "Lease") (whether written or oral and whether now or hereafter in effect) pursuant to which any party, other than _____, is granted a possessory interest in, or right to use or occupy all or any portion of the Mortgaged Premises.

(n) The Borrower and the Guarantors (i) have made or filed all Federal and state income and all other tax returns, reports and declarations required by any jurisdiction to which it is subject, (ii) have paid all taxes and other governmental assessments and charges shown or determined to be due on such returns, reports and declarations, except those being contested in good faith and by appropriate proceedings and (iii) have set aside on its books provisions reasonably adequate for the payment of all taxes for periods subsequent to the periods to which such returns, reports or declarations apply. There are no unpaid taxes in any material amount claimed to be due by the taxing authority of any jurisdiction, and neither Borrower nor any Guarantor know of any no basis for any such claim.

(o) Except as set forth on **Schedule 3(o)**: (i) Borrower has obtained or will timely obtain all such licenses, permits, authorizations, consents and approvals required for the operation of its business and the Project; (ii) all such licenses, permits, authorizations, consents and approvals obtained prior to the date hereof are in full force and effect; and (iii) all appeal periods permitting the challenge of any such licenses, permits, authorizations, consents or approvals obtained prior to the date hereof have expired.

(p) Borrower has not received any notices from any insurer or its agent requiring performance of any work with respect to the Mortgaged Premises or canceling or threatening to cancel any policy of insurance, and the Mortgaged Premises

comply, and will comply, with the requirements of all insurance carriers.

(q) None of the assets of either Borrower or any Guarantor are assets of a plan currently subject to regulation under the Employee Retirement Income Security Act of 1974.

(r) Neither Borrower nor any of the Guarantors is not a "holding company," or a "subsidiary company" of a "holding company," or an "affiliate" of a "holding company," as such terms are defined in the Public Utility Holding Company Act of 1935; nor is it an "investment company," or an "affiliated company" or a "principal underwriter" of an "investment company," as such terms are defined in the Investment Company Act of 1940.

(s) Except for amounts not yet due and payable, there are no unpaid or outstanding Impositions (as defined in the Mortgage) on or against the Mortgaged Premises or any part thereof. As of the date hereof, (i) no abatement proceedings are pending with reference to any real estate taxes assessed against the Mortgaged Premises, (ii) there are no betterment assessments or other special assessments presently pending with respect to any portion of the Project, and (iii) Borrower has no knowledge of any such assessment being contemplated.

(t) No portion of the Mortgaged Premises contains a historic structure or landmark and no portion of the Mortgaged Premises is located within any historic district pursuant to any federal, state or local law or governmental regulation.

(u) As of the date hereof, there are no pending condemnation proceedings against all of the Mortgaged Premises or any part thereof, and, to Borrower's knowledge, no such proceeding is presently threatened or contemplated by any taking authority.

(v) All information submitted to the Bank in connection with the Loan transaction taken as a whole is true and correct in all material respects and does not omit to state any fact that would be necessary to make the information submitted not materially misleading. Borrower acknowledges and agrees that all representations, warranties and covenants made to Bank in the Commitment or in any other instrument delivered in connection with the Loan have been, and shall be deemed to have been, relied upon by Bank and shall survive the closing hereunder regardless of any investigation made by Bank or on its behalf.

(w) Borrower has dealt with no broker or finder in connection with the Loan.

4. CONSTRUCTION AND COMPLETION OF THE PROJECT.

4.1 Cause Completion of Construction. Borrower and Guarantors will cause construction of the Project to be carried on continuously to completion, lien free. The Borrower will commence construction of the Project by _____ and shall complete construction of the Project no later than _____. Borrower agrees to obtain a Certificate of Occupancy within thirty (30) days of completion of the Project. Completion of the Project shall be evidenced by a Certificate of the Architect (as defined in the Site Professional Consent).

4.2 Constructed in Accordance with All Applicable Legal Requirements. The Project will be constructed in all material respects in accordance with all applicable Legal Requirements. The Project will be constructed entirely on the Mortgaged Premises and will not encroach upon or overhang any easement, building line or right of way, and, when erected, will not violate applicable use or other restrictions of record. If, in Bank's reasonable judgment, the Project is not in substantial

conformity with the foregoing, Bank shall have the right to stop the work and order repair or reconstruction in accordance therewith and to withhold its consent to all further disbursements, pursuant to **Section 7** hereof, until the work is in satisfactory compliance with all Legal Requirements. Upon notice from Bank to Borrower, or Borrower's discovery irrespective of such notice, that the Project is not in substantial conformity with all Legal Requirements, Borrower shall commence correcting the deviation, as promptly as practicable, and in any event within fifteen (15) days after the notice or discovery, and shall prosecute such work diligently to completion within thirty (30) days after such notice or discovery or such number of days not to exceed ninety (90) days from the date of such notice or discovery as is reasonably required to cure the same, provided that the Borrower promptly commences to cure within the initial thirty (30) day period and diligently thereafter prosecutes the curing of the same and that the Borrower keeps the Bank apprised of its progress in doing the same. No other notice shall be required to render such deviation an Event of Default hereunder.

4.3 Ownership and Materials. All materials incorporated in the Project will be purchased so that absolute ownership and title vest in Borrower upon delivery of such materials to the Mortgaged Premises.

5. SELECTED COVENANTS OF BORROWER AND GUARANTORS. The Borrower and the Guarantors covenants, undertakes and agrees as follows, as appropriate:

(a) The Borrower will duly and punctually pay or cause to be paid the principal and interest on the Loan and all interest and fees provided for in the Note, this Agreement and the other Loan Documents, all in accordance with the terms of the Note, this Agreement and the other Loan Documents.

The Borrower will reimburse Bank within fifteen (15) days of receipt of an invoice for all reasonable costs and expenses paid or incurred by Bank incidental to the making, administration and enforcement of the Loan, including but not limited to the costs of title insurance policies, title examinations, recording fees, surveys, appraisal fees, inspection fees, reasonable attorneys' fees and out-of-pocket expenses, all of which Bank is authorized to deduct from the proceeds of disbursements hereunder. Any such amounts not paid by Borrower to Bank on or before the fifteenth (15th) day after Bank bills Borrower for same shall bear interest at the Default Interest Rate (as defined in the Note) compounded monthly.

(b) Borrower will make available for inspection and reproduction by a duly authorized representative of Bank any of Borrower's books, records, contracts (including, without limitation, any and all construction contracts and subcontracts and architect's and other professional contracts insofar as they relate to the Project) and other construction-related documents (including, without limitation, plans and specifications and any working drawings, insofar as they relate to the Project), at such times as reasonably requested by Bank when requested to do so and will furnish to Bank any information regarding Borrower's business affairs and financial condition as Bank may, from time to time, request.

(c) Borrower will within fifteen (15) days following demand reimburse Bank for the cost and expense of any appraisal of the Mortgaged Premises obtained by Bank on or after the date hereof if such appraisal is obtained by Bank pursuant to the requirements of any law, statute, rule, regulation, interpretive ruling, opinion, or directive of any state or federal governmental agency or unit governing, regulating or controlling the activities of Bank, whether now existing

or hereafter enacted.

(d) Within thirty (30) days following Bank's request therefor from time to time (but not more frequently than once during any twelve (12) month interval subsequent to the closing of the Loan provided that there has not occurred an Event of Default which is continuing), Borrower shall deliver to Bank an MAI appraisal of the Mortgaged Premises and the Project, prepared by an appraiser satisfactory in all respects to the Bank in its sole discretion. The reasonable costs of obtaining and reviewing such an appraisal (excluding internal costs of the Bank for such review) shall be borne by the Borrower.

(e) Without the prior written consent of the Bank, no materials, equipment, personal property, or fixtures of any kind will be purchased or acquired by Borrower for installation or use in or about the Improvements under any conditional sales contract or security agreement or any lease agreement, and all such materials, equipment, personal property, and fixtures will be fully paid for before payment therefor becomes past due or in any event within ten (10) days after delivery thereof; provided, however, that the foregoing shall not apply to either amounts withheld pursuant to the retainage requirements of a contract approved by Bank governing the purchase of such materials, equipment, personal property, and fixtures or unpaid on account of bona fide disputes with the suppliers so long as with respect to such disputes either (i) Borrower shall have first provided Bank with a bond or other security satisfactory to Bank in its sole discretion, and such contest does not affect the priority of the Mortgage or any advance of the Loan, or (ii) the Borrower has provided the Bank with an endorsement to the Title Policy issued by the Title Company, as those terms are defined below, insuring the priority of the Mortgage or any advances of the Loan to

such potential lien.

(f) Borrower will furnish or cause to be furnished to Bank and _____ (the "Title Company"), the issuer of the Title Policy (as hereinafter defined), any affidavits, lien waivers, subordinations, releases, or other evidence reasonably requested by the Title Company or by Bank from time to time to establish that all bills for labor and materials entering into said construction and all bills of the contractor and all bills of subcontractors, laborers, and materialmen in said construction have been paid in full except for retainage requirements approved by Bank and those bills which have become due and payable since the next preceding disbursement by Bank hereunder.

(g) Borrower shall maintain with Bank throughout the term of the Loan, and any extension thereof, an interest bearing commercial operating account ("Operating Account"). All disbursements of Loan proceeds may be made by the Bank by crediting such disbursements directly into the Operating Account. Borrower agrees that such disbursements shall constitute Advances under this Agreement and the Note. In addition, Borrower authorizes Bank to pay any principal or interest upon the Note when and as the same shall become due under the terms thereof by debiting the Operating Account.

(h) Borrower shall obtain and keep in full force and effect at all times that the Loan or any portion thereof remains outstanding (i) comprehensive general liability insurance, personal and bodily injury, death and property damage insurance, in the amount of _____ Dollars ($_____) for injury to or death of one (1) person, and _____ Dollars ($_____) for overall personal injury, (ii) all-risk insurance regarding damage to the Mortgaged Premises in the amount of the lesser of (x) the outstanding balance on the Loan, and (y) one hundred

percent (100%) of the full replacement cost of the Project, (iii) business interruption insurance coverage in an amount no less than the projected income to be generated by the fully-operational Project for a period of at least nine (9) months, (iv) worker's compensation insurance in such amounts as is required by applicable Legal Requirements, and (v) such other insurance and increased coverage amounts as shall be reasonably required by Bank from time to time. In addition, the Borrower shall cause (a) the General Contractor, during any period in which construction is being completed at or on the Mortgaged Premises (including but not limited to the Project), to maintain builder's risk completed value insurance with fire, earthquake and extended coverage (including collapse, cost of demolition, removal of debris, and increased cost of construction), (b) any contractor performing work to maintain policies of comprehensive general liability insurance in amounts that may be reasonably requested by the Bank from time to time, and (c) any contractor performing work to maintain worker's compensation insurance in such amounts as is required by Legal Requirements. Bank shall be named as an additional insured upon any required liability policies and as mortgagee and loss payee upon any required all-risk insurance policies. Both Borrower and Bank shall be named as additional insureds on all insurance policies, including without limitation, the builder's risk policy, maintained by General Contractor. All required insurance policies shall be maintained with companies with a Best's Insurance Reports policy holders' rating of A+ and a financial category of Class X, in such form and in such amounts as Bank shall from time to time reasonably require, and the Borrower will use its best efforts to obtain insurance coverage in amounts necessary to avoid the effects of coinsurance; provided that any insurance policy which is written on a coinsurance basis must provide a so-called "agreed amount

endorsement" which evidences that the coverage amount is sufficient to insure the full amount of the outstanding balance on the Loan. All insurance policies shall be noncancellable with respect to Bank except upon at least thirty (30) days' prior written notice. Borrower shall deliver or cause to be delivered to Bank the original policies of such insurance or certificates thereof (with certified copies of the original policies) in form and substance satisfactory to Bank. Not less than thirty (30) days before the expiration, termination or nonrenewal of any insurance policies, Borrower will deliver to the Bank certified copies of new or renewal policies covering the risks, in the amounts and otherwise in compliance with the terms required hereunder. In addition to the insurance coverages specified above, Borrower shall at all times maintain an Environmental Insurance policy with _____ in such amount and form as set forth in the specimen policy attached hereto as **Exhibit D**.

(i) Borrower shall notify Bank, in writing, within _____ (__) days of the Borrower's acquiring knowledge of the occurrence thereof of any Event of Default (as hereinafter defined) or of any event which, with notice or lapse of time or both, would become an Event of Default. If any party shall give any notice to Borrower or to Borrower's knowledge take any other action in respect of a claimed default (whether or not constituting an Event of Default) under this Agreement or under any note, evidence of indebtedness, indenture or other obligation to which or with respect to which Borrower or any Guarantor is a party or obligor, whether as principal or surety, Borrower shall forthwith give, or cause to be given, written notice thereof to Bank, describing the notice or action and the nature of the claimed default.

(j) Borrower hereby agrees that Bank may release publicity

articles concerning the financing of the Acquisition and the Project. Borrower shall cooperate with Bank with respect to any such publicity, and will use good faith efforts to notify Bank of any publicity-related events relating thereto and offer Bank an opportunity to participate in any such events. In addition, Borrower shall erect a sign on the Mortgaged Premises indicating that Bank is the source of financing for the Project, and to use the Loan amount, Borrower's name and the location of the Mortgaged Premises in any advertisement of Bank. All of the actual costs and expenses incurred in connection with erecting such sign shall be paid by the Borrower.

(k) Borrower shall not disclose to the general public or, except as necessary for the conduct of its business in the ordinary course, any third parties, the terms of the Loan (except to the extent that the same are a matter of public record) nor the identity of any participants in the Loan without the Bank's prior written consent.

(l) Borrower and Guarantors will furnish annually, and at other times promptly following the reasonable request of Bank therefor, such request to be made in the Bank's exercise of its reasonable business judgment, current, unaudited financial information and a certification by the Borrower, if true, that no adverse condition has occurred that would affect the Loan, the Project or the Mortgaged Premises. Such financial information shall include a balance sheet, income statement (showing all items of income and expense) and shall include statement of changes in financial positions and copies of Federal and state income tax returns for the Borrower and all Guarantors (or other appropriate entity which files tax returns to report the financial transactions of the Borrower) (together with copies of any and all requests for extensions for the filing of such income tax returns), rent roll, status

report of lease and sales negotiations, operating statements (showing all items of income and expense for the operation of the Mortgaged Premises), and such other information as Bank may reasonably require. The financial information shall be on an income tax basis and shall be certified by the Chief Financial Officer of the Borrower and the Guarantors or other party acceptable to Bank. The annual financial information regarding the Borrower and Guarantors shall be delivered to Bank within one hundred twenty (120) days following the close of each party's taxable year; provided, however, that any Federal or state income tax returns (as well as any requests for extensions for the filing of such income tax returns) shall be delivered within thirty (30) days of the filing thereof. The form of such financial information shall be reasonably satisfactory to Bank. Failure by the Borrower or Guarantors to deliver such annual financial information within fifteen (15) days after the Borrower's receipt of notice of such failure hereunder shall constitute an immediate Event of Default. Without limiting any of Bank's other rights and remedies hereunder following such an Event of Default, Bank may, at its option, assess a late fee therefor in the amount of _____ ($_____) for each successive thirty (30) day period after the initial fifteen (15) day notice and grace period that such financial information is not delivered. The Borrower and the Guarantors hereby warrants as to the accuracy of all financial information of the Borrower and the Guarantors provided heretofore or to be provided hereafter in all material respects. The Bank agrees that the Bank will not, without the prior written consent of the Borrower, distribute financial information received by the Bank heretofore or to be delivered hereafter (or copies of the same) other than to officers and employees of the Bank and its successors and assigns (including, without limitation, participants, as provided below), their respective attorneys and accountants, and any governmental agencies to which

the Bank or its successors and assigns are required to disclose such documentation. Borrower shall maintain the dates for the start of the fiscal and tax years as are in place at present unless it advises Bank in writing to the contrary.

(m) Borrower will furnish to Bank, within thirty (30) days of execution, all Leases and all other Material Property Agreements affecting the Mortgaged Premises provided that the language contained in this subsection shall in no way affect any requirement in any Loan Document regarding the Bank's prior approval of all Leases and other Property Agreements.

(n) The Borrower and the Guarantors have, contemporaneously herewith, executed and delivered to the Bank the Environmental Indemnity Agreement, the terms of which Environmental Indemnity Agreement (including the representations, warranties, obligations and indemnities contained therein) are hereby incorporated herein by reference. Borrower's and Guarantors' respective representations, warranties, obligations and indemnities under the Environmental Indemnity Agreement shall not be terminated, released, discharged, extinguished, or otherwise affected by any foreclosure of any indebtedness or obligation, any satisfaction of the indebtedness secured by the Mortgage or the release or discharge of the Mortgaged Premises or any other action or thing, except and unless such representations, warranties, and obligations are expressly released in writing by Bank, which writing shall refer particularly to this Section. The provisions of this Section may be enforced at any time by Bank and, without limiting the foregoing, shall survive the payment or other satisfaction by any means of the obligations evidenced by the Note and the release and discharge of the Mortgage, except in the case of a specific written release by Bank as to this Section, as referred to

above.

(o) Borrower will maintain its chief executive office in _____, Massachusetts, or at such other place in the United States of America as Borrower shall designate upon not less than thirty (30) days' prior written notice to Bank.

(p) Borrower will give notice to Bank in writing within thirty (30) days of becoming aware of any litigation or proceedings threatened in writing or any pending litigation and proceedings affecting the Borrower or Guarantors or to which the Borrower or Guarantors is are or are to become a party involving an uninsured claim against the Borrower or Guarantors that could reasonably be expected to have an adverse effect on the Borrower or any Guarantor (meaning a claim which, if decided adversely for any Borrower or any Guarantor, would result in a liability to such party in excess of $100,000) and stating the nature and status of such litigation or proceedings. The Borrower will give notice to Bank, in writing, in form and detail reasonably satisfactory to Bank, within fifteen (15) days of any judgment in excess of _____ Dollars ($_____) not covered by insurance, final or otherwise, against the Borrower or any Guarantor.

(q) Borrower agrees not to suffer any attachment (except for Notices of Contract under Mass. Gen. Laws Chapter 254 or Statements of Account thereunder, provided that (i) with respect to any such Notices of Contract or Statements of Account, the Borrower informs the Bank of the filing of the same upon Borrower's acquiring knowledge of same and (ii) with respect to any Statements of Account only, the Borrower bonds over such lien, provides an endorsement to the Title Policy issued by the Title Company insuring the priority of the Mortgage over such lien, or otherwise addresses the lien established thereby to the reasonable

satisfaction of the Bank prior to the earlier of (a) twenty (20) days of Borrower's acquiring knowledge of the same, and (b) the date on which the lien attains priority over the lien of the Mortgage), whether by trustee process or otherwise, to be made against Borrower's interest in this Agreement or any payment hereunder. In addition, the Borrower further agrees not to assign or transfer this Agreement or any interest herein or right to payment hereunder (except for a Permitted Transfer as defined below) without the prior written consent of Bank, which Bank may give or withhold in its absolute discretion. Any such assignment or transfer made without Bank's consent shall be void and of no force or effect and shall at Bank's election be an immediate Event of Default hereunder.

(r) Without the prior written approval of Bank in each instance obtained:

(i) Borrower shall not permit the use of the Mortgaged Premises for any purpose except for use as a _____, with parking, and any other uses incidental, appurtenant or ancillary thereto which are permitted under the Legal Requirements (for which uses the Bank's approval shall not be unreasonably withheld or delayed);

(ii) Borrower shall not borrow any sums from any source other than the Bank if such sums are secured by mortgages, pledges or other encumbrances on the Mortgaged Premises or any other collateral securing the Loan; or

(iii) In addition, without the prior written approval of Bank obtained, neither Borrower nor any Guarantors will not voluntarily or involuntarily convey, assign, transfer, dispose of or encumber, or permit the conveyance, assignment, transfer, disposal or

encumbrance, of any part or all of any direct or indirect legal or beneficial interest in Borrower, the Mortgaged Premises or any of the real estate or personal property included therein (including in such personal property, without limitation, rents and other contractual claims); provided, however, that so long as there has not occurred an Event of Default (or an event which with the passage of time, the giving of notice or both would constitute an Event of Default), the following shall be permitted without the prior written approval of the Bank (together, the "Permitted Transfers"): NONE.

(s) Except as provided in the Assignment of Permits, the Borrower shall not enter into, amend, modify, cancel or terminate (except for cause), or permit to be entered into, materially amended or modified, canceled or terminated (except for cause), any Property Agreement without the prior written approval of Bank, and Bank may require mortgagee protection provisions in any such Property Agreement as a condition of its approval. All Property Agreements and payments due thereunder shall be fully subordinate to any of the liens created under the terms of the Loan Documents. Borrower shall perform all of its obligations under each of the Property Agreements. Borrower shall give Bank written notice of a default under any Property Agreement beyond any applicable notice and cure period as soon as Borrower learns of such default. Borrower shall deliver or cause to be delivered to the Bank, within fifteen (15) days after the execution thereof, complete, fully executed copies of all Material Property Agreements.

(t) Borrower shall (and shall cause the Guarantor to), at Borrower's sole cost and expense, execute and deliver to Bank such documents, instruments, certificates, assignments and other writings, and do such other acts

necessary or desirable, to evidence, preserve and/or protect the collateral at any time securing or intended to secure the obligations of Borrower hereunder or under the other Loan Documents or effectively carry out the intent and purpose of this Agreement and the other Loan Documents, as Bank shall reasonably require from time to time.

(u) Should any stamp or other tax now or hereafter become payable with respect to this Agreement, the Note, the Mortgage or any of the other Loan Documents, or their execution or delivery, Borrower will promptly pay the same and indemnify Bank against and hold Bank harmless from the costs of the same.

(v) Borrower agrees to give to Bank prompt written notice of any fire, explosion, accident, flood, storm, earthquake or other casualty or strike, lockout, act of God or other event or circumstance beyond Borrower's control affecting the Project or the Mortgaged Premises, or any interruption of the ability of Borrower to complete the Project by _____. (w) The Borrower and each Guarantor will comply with any and all of the Borrower's respective covenants and agreements provided elsewhere in this Agreement and in any other Loan Document.

(w) Borrower covenants to provide Bank, at any time Bank is entitled under the Assignment of Leases to exercise its rights thereunder, with possession of all security deposits (including without limitation any letters of credit or other security therefor) held by Borrower pursuant to any Leases promptly upon written demand by the Bank therefor. In the case of any security deposits which are held in the form of letters of credit, the foregoing covenant shall include the obligation to provide the Bank with the original of all such letters of credit and to execute and deliver to Bank such documentation necessary to authorize the prompt transfer of such letters of credit to the Bank as beneficiary

thereunder. In the event the transfer documentation delivered by Borrower is determined by Bank's counsel to be unsatisfactory, Bank's counsel shall send written notice to Borrower that describes in detail any matters deemed unacceptable in such documentation and Borrower shall promptly correct such matters, including executing any additional documents that Bank's counsel provided to Borrower. For purposes of this **Section 5(x)**, "prompt" or "promptly" shall mean "as immediately as practical without any undue delay."

(x) Borrower agrees that it shall be responsible for all fees and expenses of the Bank's Consultant.

CONDITIONS TO MAKING OF ADVANCES.

6.1 Conditions to Making of First Advance. Borrower will, on or prior to the date of the first disbursement of the Loan hereunder, comply with all terms and conditions set forth herein and, in addition, Borrower shall deliver or cause to be delivered to Bank the following, all in form and substance satisfactory to Bank (unless one or more of such requirements has or have been waived in writing by the Bank):

(a) The Note duly executed by Borrower.

(b) The Mortgage, duly executed by the Borrower, which shall be a first and prior lien upon the portion of the Mortgaged Premises owned by _____ and upon the Improvements thereon or to be erected thereon, subject only to the Permitted Encumbrances.

(c) The Assignment of Leases duly executed by the Borrower.

(d) The Assignment of Permits duly executed by the Borrower.

(e) The Financing Statements.

(f) The Guaranties duly executed by the Guarantors. [Intentionally omitted].

(g) The Site Professional Consents duly executed by the General Contractor, and the Project Architect.

(h) The Environmental Indemnity Agreement duly executed by the Borrower and Guarantors.

(i) The Security Agreement and Assignment of Earnout Advance duly executed by the Borrower (and the underlying assignment of the First Earnout Advance duly executed by _____).

(j) The Leasehold Mortgage, duly executed by the Borrower, which shall be a first and prior lien upon _____'s Leasehold Interest and upon the Improvements thereon or to be erected thereon, subject only to the Permitted Encumbrances.

(k) The Blocked Account Agreement duly executed by the Borrower.

(l) [Intentionally omitted.]

(m) Environmental Site Assessments, consisting of the report listed under the definition of Environmental Site Assessment in the Environmental Indemnity Agreement (such report is referred to herein as the "Environmental Report"). The Bank acknowledges the Borrower's delivery of the Environmental Report and hereby acknowledges the Bank's review and approval of the Environmental Report.

(n) An ALTA (1992) mortgagee's policy of title insurance and leasehold mortgagee's policy

of title insurance of the Bank's interest in the Leasehold Interest (together, the "Title Policy") issued by the Title Company for the amount of the Loan disbursed insuring the Mortgage as of the time of its filing for record as a first and prior lien upon the Mortgaged Premises and on the Improvements to be erected thereon, subject only to the Permitted Encumbrances, with date down and increase coverage for subsequent Advances. Contemporaneously with the delivery to Bank of the commitment for the Title Policy, Borrower shall also deliver to Bank copies of all documents constituting the Permitted Encumbrances.

(o) Written opinions of _____, Esq. ("Borrower's Counsel"), as Borrower's counsel and Guarantors' counsel, in form and substance satisfactory to Bank and opining as to such legal matters as the Bank may require, including without limitation, matters concerning due authority, enforceability, environmental/developmental permitting and zoning.

(p) Evidence that Borrower has met the insurance requirements of Bank, all in form and amount satisfactory to and approved by Bank.

(q) Evidence satisfactory to Bank that the Mortgaged Premises are not included in a special flood hazard area as designated by the Federal Emergency Management Agency on its Flood Hazard Boundary Map and Flood Insurance Rate Maps, and the Department of Housing and Urban Development, Federal Insurance Administration, Special Flood Hazard Area Maps.

(r) The Federal Tax Identification number of the

Borrower (or other appropriate entities which file tax returns to report the financial transactions of the Borrower) and the LLC Guarantors and the Social Security Number of the Individual Guarantor.

(s) Evidence satisfactory to the Bank in all respects that the Loan and the transactions contemplated by this Agreement have been duly authorized by all requisite limited liability company actions.

(t) Current surveys and site plans (together the "Property Survey") showing the outline of the Mortgaged Premises and all matters referenced in the Title Policy which are appropriately shown on a survey. Said survey shall be currently dated and shall be prepared in accordance with (i) the Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys (the "Minimum Requirements"), as jointly adopted by the American Land Title Association and the American Congress on Surveying and Mapping in 1992 (or as amended), including items 1-4, 6-11 and 13 on Table A thereof, and (ii) requirements of Mass. statutes, bearing a proper certificate by the surveyor, which certificate shall include the legal description of the Mortgaged Premises, shall be made in favor of Bank and the Title Company and shall contain such other certifications as are contemplated by the Minimum Requirements and applicable Mass. statutes. The survey shall also contain such additional information as may reasonably be required by Bank or the Title Company. The survey shall be subject to the approval of Bank and certified by a Massachusetts registered land surveyor approved by Bank.

(u) Copies of all Property Agreements affecting the Mortgaged Premises as of the closing date in form

and substance satisfactory to Bank.

(v) All of those items required by the Commitment Letter under the Section entitled "Conditions to Disbursement", including without limitation a Site Professionals Certificate more particularly described in said Section.

(w) If required by the Bank, evidence satisfactory to Bank that there is not pending against the Borrower or any of the Guarantors any petition in bankruptcy, whether voluntary or involuntary, an assignment for the benefit of creditors, a petition for reorganization or any other proceeding pursuant to any Federal or state bankruptcy or insolvency law.

(x) Current financial statements (including a schedule of contingent liabilities) of the Borrower which indicate no material adverse change from those previously delivered to the Bank dated _____, 20__, together with current financial statements for each of the Guarantors.

(y) For the Borrowers, (i) a certified copy of the Certificate of Organization for each Borrower issued by the Secretary of the Commonwealth of Massachusetts, dated no more than thirty (30) days prior to the date hereof, and (ii) a Certificate of Legal Existence and Good Standing for the Borrower issued by the Secretary of the Commonwealth dated no more than thirty (30) days prior to the date hereof, and (iii) a Member's Certificate issued by the sole Member of the Borrower indicating the due authorization of the transactions contemplated by this Agreement. [Intentionally omitted.]

(z) For the LLC Guarantors, (i) a certified copy of the

Certificate of Organization for each LLC Guarantor issued by the Secretary of the State of New York, dated no more than thirty (30) days prior to the date hereof, and (ii) a Certificate of Legal Existence and Good Standing for each LLC Guarantor issued by the Secretary of the State of New York dated no more than thirty (30) days prior to the date hereof, (iii) a Certificate of Qualification as a foreign limited liability company for each LLC Guarantor, issued by the Secretary of the Commonwealth of Massachusetts, dated no more than thirty (30) days prior to the date hereof, and (iv) a Member's Certificate issued by the sole Member of each LLC Guarantor indicating the due authorization of the transactions contemplated by this Agreement. . [Intentionally omitted.]

6.2 Construction Conditions to Making of the First Advance. On or prior to the date of the first Advance of the Loan hereunder, Bank shall have received the following items. No Advance shall be made by Bank hereunder for any portion of construction of the Project until these items have been reviewed and approved by Bank:

6.2.1 A cost breakdown for the Project (the "Project Cost Analysis") which shall contain a detailed full cost budget for the Project, specifying on a line item-by-line item basis all hard and soft costs that are necessary and sufficient for the final completion of the Project and otherwise necessary to make the Project ready for its full use and occupancy and operation. The Project Cost Analysis shall also include (a) a summary page indicating costs of Acquisition, site work, construction and soft costs on an AIA Form G703

and (b) detailed schedules supporting the site work and construction costs shown on the AIA Form G703 according to Construction Standards Institute Division, if any. The Project Cost Analysis shall contain a breakdown of Loan proceeds showing that no more than $_____ of Loan proceeds shall be used for Acquisition, no more than $_____ shall be used for construction of the Project and $_____ of Loan proceeds shall be available for costs of closing, an environmental contingency line item and an interest reserve.

6.2.2 All of the Construction Contract and the Architects' Contracts and all other primary contracts and subcontracts related to construction of the Project, if any.

6.2.3 A list of all known and contemplated contractors used for development of the Project.
6.2.4 Site Professionals' Certificate containing a detailed listing and description of the Plans and Specifications and certifying to the effect that (i) when completed, the Project will comply with all currently applicable laws, ordinances, rules and regulations and with all covenants, conditions, easements and restrictions to which the Project is subject; (ii) any and all required licenses, certificates, consents and permits for and approval of the Project and the Plans and Specifications have been issued by all governmental and private authorities and agencies having jurisdiction thereof; (iii) all necessary contracts are in place for the Project such that, when complete, the Borrower will have a fully operational _____; (iv) there is adequate and sufficient water, storm and sanitary sewers, gas,

electric and telephone service available to the Mortgaged Premises without the necessity of any onsite or offsite improvements other than those provided in the Plans and Specifications and the Project Cost Analysis; and (v) the amounts set forth in the Project Cost Analysis are adequate and sufficient to fully complete and furnish the Project.

6.2.5 Construction Schedule provided by Borrower setting forth the approximate start and finish dates of all major stages of the Project.

6.2.6 Evidence that all building permits and governmental approvals necessary for the Project have been obtained, all appeal periods applicable thereto have expired without an appeal having been filed and such permits and approvals are otherwise in full force and effect for the period of time necessary to complete the Project.

6.3 Conditions to the Making of All Subsequent Advances After Closing. On or prior to the date of each subsequent Advance of the Loan hereunder, Bank shall have received the following:

6.3.1 Plans and Specifications (or any changes thereto) for the Project to the extent not already delivered to Bank.

6.3.2 A certificate from the Bank's Consultant certifying (i) that the construction of the Project theretofore completed, if any, has been performed substantially in accordance with the Plans and Specifications, (ii) that the quality of construction of the Project theretofore completed is in accordance with generally accepted standards in the construction industry for the construction

of similar improvements, (iii) the estimated total cost of the construction of the Project, (iv) that the undisbursed portion of the Loan as shown on the Project Cost Analysis plus any equity contribution made or to be made by Borrower is adequate to complete the construction of the Project pursuant to the Plans and Specifications, and (v) that the completion of the Project will reasonably occur on or before _____.

6.3.3 An endorsement to the Title Policy indicating that since the last preceding disbursement of the Loan there has been no change in the state of title and no survey exceptions not theretofore approved by Bank and increasing the coverage of the Title Policy by an amount equal to the disbursement then being made so that the total amount insured equals the total amount disbursed by Bank under the terms hereof and changing the effective date of the Title Policy to the date of the disbursement.

6.3.4 Evidence satisfactory to the Bank that all of the fees due and payable to the Bank's Consultant have been paid in full by the Borrower.

6.3.5 Evidence satisfactory to Bank that each of the representations and warranties of Borrower contained in this Agreement or the other Loan Documents shall be true in all material respects as of the date as of which it was made and shall also be true at and as of the time of the making of the disbursement, with the same effect as if made at and as of that time, except to the extent of changes resulting from transactions contemplated or permitted by this Agreement and the other Loan Documents, and no Event of Default shall have

occurred and be continuing.

6.3.6 Such other items as the Bank may from time to time reasonably require, including a foundation survey satisfactory to the Bank, bearing a certification by the surveyor.

6.4 Condition to Making of Final Advance. Borrower will, on or prior to the date of the final disbursement of the Loan hereunder, deliver or cause to be delivered to Bank the following:

6.4.1 Evidence satisfactory to Bank of the issuance by all appropriate governmental authorities of certificates of use and occupancy for the Improvements.

6.4.2 A final as-built survey satisfactory to Bank, bearing a proper certificate by the surveyor, showing the completed Improvements and all easements and right-of-ways.

6.4.3 An additional endorsement to the Title Policy in form and substance satisfactory to Bank insuring the priority of the Mortgage in the full amount of the Loan against mechanics' and materialmen's liens (including inchoate liens) arising by reason of unpaid labor and materials supplied in connection with the construction and development of the Project.

6.4.4 A Certificate of Substantial Completion on AIA Form G704 from the Architect and General Contractor certifying that the Project has been completed substantially in accordance with the Plans and Specifications and in compliance with all applicable Legal Requirements, and the Bank's Consultant's concurrence with such Certificate of

Substantial Completion.

6.4.5 An affidavit of the General Contractor stating that each person providing any material or performing any work in connection with the Mortgaged Premises has been (or will be, with the proceeds of and immediately following receipt by Borrower of such final Loan disbursement) paid in full or bonded or insured to the reasonable satisfaction of Bank.

6.4.6 A certificate of insurance evidencing that the Borrower is the named insured on an all-risk insurance policy covering the Mortgaged Premises and the completed Project (including all then existing structures and improvements) at full replacement cost, such that there is no gap in coverage upon completion of construction of the Project and termination of any builder's risk coverage being provided by the General Contractor. In addition, the Borrower shall then provide updated evidence of the additional insurance coverage required to be provided pursuant to **Section 5(h)** of this Agreement, including without limitation general liability and business interruption coverage, all in such amounts and upon such terms as further set forth in said **Section 5(h)**.

6.4.7 An affidavit of the Borrower certifying that the Project has been completed and that _____has commenced ordinary business operations of the Project as a _____ facility at the Mortgaged Premises.

7. PROCEDURE FOR DISBURSEMENTS OF LOAN. Subject to the terms and conditions hereof, Bank shall disburse the

proceeds of the Loan made hereunder, from time to time, for payment of costs of the construction of the Project, as such construction occurs as determined by the Bank's Consultant, and other costs included in the Project Cost Analysis. Advances shall be made upon written request of Borrower in the following manner:

(a) Not less than five (5) business days before the date on which Borrower desires a disbursement, Borrower shall submit to Bank a requisition using an Application and Certificate for Payment in the form of AIA Forms G702 and G703 accompanied by a cost breakdown, the accuracy of which shall be certified by Borrower and such other information and documentation required hereunder. Such requisition shall be duly executed by the Borrower and, if the Requisition includes a payment to the General Contractor, such Requisition shall also be executed by the General Contractor and shall be approved by the Bank's Consultant. The Project Cost Analysis shall serve as the disbursement control for each line item and Bank shall not be required to disburse funds for any line item in excess of the amount set forth in the Project Cost Analysis. Borrower's disbursement requisitions shall include copies of invoices and other documents, including a cost breakdown, to support the amount of any nonconstruction cost items contained in the disbursement request summary. The Bank will instruct the Bank's Consultant to use its best efforts to review and approve any complete payment requisition package within five (5) business days of the Bank's Consultant's receipt of the same. The Bank will, in turn, use its best efforts to review, approve of and pay any payment requisition within five (5) business days, but in any event not more than fifteen (15) business days, of the Bank's receipt of a complete payment requisition package (including, without limitation, additional documents which the Bank or the Title Company may

require pursuant to **Section 7(c)**) which has been duly received and approved by the Bank's Consultant. Failure by either party to review and approve of any requisition package within the foregoing time frame will not create any implication of consent of such package or be a default of such party giving rise to any remedy of Borrower as a result thereof.

(b) Requests for disbursements after the first disbursement shall be submitted on a monthly basis (but shall not be submitted more often than once a month) and shall be reviewed and approved by the Borrower prior to submission to the Bank. The total amount advanced on account of hard construction costs shall not at any time exceed an amount equal to (i) the percentage of completion of the Project evidenced by the inspections of the Improvements by the Bank's Consultant, times (ii) the estimated total construction costs for the Project filed by Borrower and General Contractor and approved by the Bank. Prior to each disbursement, at Borrower's expense, the Construction Consultant shall inspect the Improvements to verify that the request for disbursement accurately reflects the amount of construction completed to date.

(c) Borrower shall furnish Bank and the Title Company with any evidence, lien waivers, subordinations of liens or affidavits reasonably required by the Title Company or by the Bank at the time of each disbursement to insure that all bills then due and payable for labor and materials used in constructing the Improvements and all bills due and payable to contractors, subcontractors, laborers, and materialmen have been paid in full, except those bills to be paid with the proceeds of such disbursement. However, notwithstanding the foregoing, unless required by the Title Company, the Bank will only require lien waivers,

subordinations of liens and affidavits for subcontractors who are supplying labor and materials which exceed a cost to the Borrower of $_____.

(d) The Borrower shall be permitted to redesignate any funds allocated for any single line item in the Project Budget and not used for such purpose to fund cost overruns in other line items provided that the Borrower provides the Bank with satisfactory evidence of such savings.

(e) Bank may, at Bank's election, make advances by paying bills for labor or materials directly to the persons furnishing such labor or materials or by means of dual payee checks to Borrower and any person furnishing labor or materials. Bank will make Loan disbursements for the cost of materials stored on the Mortgaged Premises for a time period of not more than forty-five (45) days, provided the same are adequately secured and insured.

(f) The Bank will not disburse proceeds of the Loan to fund the costs of materials stored at any location other than the Mortgaged Premises unless: (i) such materials are adequately segregated and identified as property pertaining to the Project and the Borrower; (ii) such materials have been inspected and approved by the Bank's Consultant (the Borrower agreeing to reimburse the Bank for the Bank's Consultant's reasonable fees and expenses incurred in connection with such inspection); (iii) if required by the Bank, Uniform Commercial Code Financing Statements perfecting the Bank's first priority security interest in such materials have been duly filed in all filing offices deemed by the Bank or the Bank's counsel to be reasonably necessary in order to perfect such a security interest (the Borrower agreeing to reimburse the Bank for all reasonable costs incurred in connection with the verification that there are no prior liens encumbering title to such materials recorded with the applicable filing

locations); and (iv) such materials are insured against theft, damage and other casualty in an amount not less than the full replacement cost of such materials with the Bank to be named as secured party and loss payee in any such insurance policies. In no event shall the Borrower request a payment (nor shall the Bank pay) for the costs of materials stored off-site in excess of $_____ for any given request for payment.

(g) No advance shall be due from the Bank unless all work done at the time the advance is requested is done in a good and workmanlike manner and without material defects, and all materials and fixtures furnished and installed at that time are furnished and installed, and all of such work has been conducted in accordance in all material respects with the Plans and Specifications in the professional judgment of the Bank Consultant, but the Bank may advance all or part of any installments before the same shall become due if the Bank believes, in its sole judgment, it advisable so to do, and all such advances or payments shall be deemed to have been made pursuant to this Agreement. Notwithstanding any other provision of this Agreement to the contrary, the making of any advance or any part of an advance shall not be deemed an approval or acceptance by the Bank of the work theretofore done or of materials theretofore furnished.

(h) Notwithstanding any provision contained herein or in any of the other Loan Documents to the contrary, the Bank shall have no obligation to make any Advances under the Loan if (a) an Event of Default has occurred and is continuing, or (b) there exists any circumstances or set of facts which, with the passage of time, the giving of notice or both would constitute or result in any such Event of Default and the default resulting from such circumstances or set of facts has not been cured prior to the expiration of any applicable

grace or cure period.

(i) Each request for disbursement shall be for an amount equal to (i) the total value of the work acceptably completed and approved for disbursement by the Bank Consultant (as set forth in **Section 7(b)** above), less (ii) retainage, which shall amount to Five Percent (5%) of each such disbursement made for the construction of the Project (hereinafter referred to as "Retainage"). The Retainage, less One Hundred Fifty Percent (150%) of the cost of so called "Punch List" items, shall be advanced by the Bank to the Borrower upon issuance of a Certificate of Substantial Completion, only.

8. SUFFICIENCY OF LOAN TO COMPLETE CONSTRUCTION OF THE PROJECT. Notwithstanding anything contained in this Agreement to the contrary, it is expressly understood and agreed that the Loan shall at all times be "in balance." The Loan shall be deemed to be "in balance" only at such time and from time to time, as Bank may determine in Bank's reasonable discretion, that the then undisbursed portion of the Loan equals or exceeds the amount necessary for the timely and full payment of (a) all work done and not theretofore paid for or to be done in connection with the completion of the construction of the Project in accordance with the Plans and Specifications, including the installation of all fixtures and equipment required for operation of the Mortgaged Premises, and (b) all other costs and expenses incurred and not theretofore paid for, or to be incurred, in connection with the Mortgaged Premises. Borrower agrees that if the Loan is deemed not to be "in balance," Borrower shall, within thirty (30) days after written request by Bank, deposit with the Bank an amount of money equal to such deficiency (the "Deficiency Deposit"), which Deficiency Deposit shall first be exhausted before any further disbursement of the Loan proceeds is made (or at Borrower's

option, provide Bank with additional collateral or other reasonable assurances (as determined by Bank in Bank's sole discretion) that such funds are or will be available). Bank shall not be obligated to make any Loan disbursement if the Loan is not "in balance".

9. EVENTS OF DEFAULT. Borrower expressly covenants and agrees that, upon the occurrence of any one or more of the events set forth below (each an "Event of Default"), all obligations on the part of Bank to make Advances of the Loan hereunder, or to make any further disbursements hereunder, shall cease and terminate, and the Note and all other indebtedness secured by the Mortgage or any other Loan Document shall thereupon become immediately due and payable:

(a) If any sum payable on account of the principal or interest of the Note or any other sum payable by the Borrower or the Guarantors hereunder or under any other Loan Document or a default which may be cured by the payment of money hereunder or under any other Loan Document shall not be paid on the date when due.

(b) If there occurs any default by Borrower or the Guarantors in the performance or observance of any covenant or agreement of Borrower or the Guarantors under this Agreement, the Note, the Mortgage or any other Loan Document (other than a default which is subject to any other provision of this **Section 9** or any other grace or cure period provided in any other Loan Document), which default is not cured within thirty (30) days of receipt of notice of such default from the Bank or such number of days not to exceed ninety (90) days from the date of notice from the Bank as is reasonably required to cure the same, provided that the Borrower or either Guarantor promptly commences to cure the same and the Borrower keeps the Bank apprised of the progress in curing the same.

(c) If any representation, warranty, certification, financial statement, loan application, or information made or furnished to the Bank by or on behalf of the Borrower or any Guarantor in connection with the Loan transaction taken as a whole (including, without limitation, those set forth in any of the Loan Documents, or any certificate or affidavit delivered in connection with the same or in conjunction with the Loan) is incomplete, inaccurate or misleading in any material respect when made or furnished.

(d) If (i) Borrower assigns this Agreement or the right to receive any disbursements or advances or any interest therein, or (ii) except for a Permitted Transfer or as otherwise permitted under any Loan Document, all or any part of any direct or indirect legal or beneficial interest in Borrower or the Project is voluntarily or involuntarily conveyed, sold, assigned, transferred, leased, disposed of or encumbered (or a contract is entered into to do any of the same), in each case without the prior written approval of Bank (which approval can be granted or withheld in Bank's sole and absolute discretion).

(e) If the Borrower assigns all or any part of the rents, issues or profits of the Mortgaged Premises other than to Bank without first obtaining Bank's written consent or, except as permitted under the terms of the Assignment of Leases, by the cancellation, surrender or modification of any Lease (or in any other manner) the security for the payment of the indebtedness under the Loan Documents shall in any manner be impaired.

(f) If the Statutory Condition of the Mortgage is breached.

(g) If the Improvements shall encroach upon the street or upon the adjoining property or upon any applicable set-

back, or any adjoining structure shall encroach upon the Mortgaged Premises, and such encroachment shall not be removed within forty-five (45) days after Bank shall have delivered notice thereof to Borrower unless such encroachment is insured over in the Title Policy.

(h) If either Borrower or any Guarantor shall make a general assignment for the benefit of creditors, or file or have filed a petition in bankruptcy, or a petition or answer seeking a readjustment of either Borrower's or any Guarantor's indebtedness under the Bankruptcy Code, or either Borrower or any Guarantor shall consent to the appointment of a receiver, trustee, custodian, liquidator or similar representative for any creditor of any of their respective properties.

(i) If (i) either Borrower or any Guarantor shall be adjudged bankrupt or insolvent, (ii) either Borrower or any Guarantor ceases, is unable, or admits in writing its inability to generally pay its debts as they become due, or (iii) a petition or proceedings for bankruptcy shall be filed against either Borrower or any Guarantor and either Borrower or any Guarantor shall admit the material allegations thereof, or an order, judgment, or decree shall be made approving such a petition and such order, judgment or decree shall not be vacated or stayed within sixty (60) days of its entry, or a receiver or trustee shall be appointed for either Borrower or any Guarantor or their respective properties or any part thereof and remain in possession thereof for sixty (60) days.

(j) If any judgment, attachment, execution or similar process is rendered, issued or levied against the Borrower or any Guarantor or any material amount of either Borrower's or any Guarantor's property and is not fully satisfied, released, vacated or bonded over within sixty (60) days after its rendering, issue or levy.

(k) If the construction of the Project is not carried on with reasonable dispatch in the judgment of Bank or if such work is not substantially completed by _____, 20__.

(l) If Borrower, the Project, the Improvements or the Mortgaged Premises fail to comply with any requirements of any Governmental Authority having jurisdiction within thirty (30) days after written notice of such requirements shall have been given to Borrower or such longer period not to exceed sixty (60) days as is reasonably required to cure the same, provided, however that the Borrower promptly commences to cure the same within the initial thirty (30) day period and diligently thereafter prosecutes the same to completion; and further provided, that said thirty (30) day period shall also be extended to up to sixty (60) days after the receipt of such notice with respect to any requirements of Governmental Authorities which are being contested by Borrower in good faith throughout such sixty (60) day period so long as Bank reasonably determines that the interests of Bank will not be jeopardized by continued noncompliance and so long as during such period Borrower keeps the Bank apprised of its progress in contesting the same.

(m) [Intentionally omitted.]

(n) If Borrower (i) fails to pay any indebtedness or other obligations, direct or indirect, for borrowed money (other than as evidenced by the Note) in excess of $_____ owing by Borrower to the Bank within fifteen (15) days of the date when due, whether at maturity, by acceleration or otherwise, or (ii) fails to perform any term, covenant, or agreement on its part to be performed under any agreement or instrument (other than this Agreement or under the Note, Mortgage, any other Loan Documents or

any other documents delivered by Borrower to Bank under this Agreement) evidencing or securing or relating to such indebtedness or other obligations in excess of $_____, when required to be performed (subject to any applicable notice and cure period), if the effect of such failure is to accelerate or to permit the holder(s) of such indebtedness or other obligations for borrowed money to accelerate the maturity of such indebtedness or other obligations for borrowed money.

(o) If the Title Company fails or refuses, by reason of any matter affecting title to the Mortgaged Premises or the Improvements, to insure any Loan disbursement as giving rise to a valid first lien, subject only to those exceptions previously approved by Bank.

(p) If the Borrower terminates, dissolves or otherwise ceases to exist or is not in "good standing" under applicable law and its status is not returned to "good standing" within thirty (30) days of the Borrower's acquiring knowledge of the same.

(q) If the Individual Guarantor dies or is incapacitated. [Intentionally omitted].

(r) If there is a material adverse change in the financial status of the Borrower or any of the Guarantors, or a material adverse change in the condition or value of the Mortgaged Estate, in the Bank's judgment.

(s) [Intentionally omitted.]

(t) [Intentionally omitted.]

(u) Failure of Borrower to comply with **Section 5(x)** of this Agreement.

Notwithstanding any provision to the contrary contained

herein or in any of the other Loan Documents, including without limitation language in any such document which states "upon the occurrence of an Event of Default" or "after an Event of Default" or words of similar import, once an Event of Default has occurred, it shall be within the sole and absolute discretion of the Bank to determine whether or not to pursue its remedies on account of such Event of Default or to accept a cure of such Event of Default (regardless of whether the Borrower or the Guarantors subsequent to the occurrence of the Event of Default take such measures as are required or necessary to cure the default underlying such Event of Default). If the Bank so elects to accept a cure of an Event of Default, then such Event of Default shall be deemed to have never occurred for purposes of this Agreement and the other Loan Documents.

10 REMEDIES. Upon the occurrence of an Event of Default, Bank may enforce any or all of its rights under this Agreement, the Note, the Mortgage, the Leasehold Mortgage, the Guaranties and any other Loan Documents, and Bank, at its option, may apply any or all funds not previously disbursed to payment of outstanding invoices and to completion of the Improvements, with the right and power in such event to enter upon and take possession of the Mortgaged Premises and the Improvements, to make such changes in the Plans and Specifications as may seem desirable, and to do all things reasonably necessary in Bank's opinion to complete or partially complete the Improvements. Bank shall not be responsible for the workmanship and materials in such completion or partial completion of construction, with the single exception that Bank shall be required to use reasonable care in the selection of the contractor or contractors used by it in such completion or partial completion. Borrower agrees to pay to Bank on demand all sums spent by Bank in managing, operating and/or completing the Project, even if the same shall be more than the amount to be advanced hereunder or

the Project is not completed, and to pay on demand to Bank, for Bank's services in connection with such completion and/or operation, such market fee as Bank may assess for the performance of such services.

11. NOTICES. All notices, requests, demands, elections, consents, approvals and other communications permitted hereunder (each a "Notice") must be in writing and addressed as follows (or at any other address and/or to the attention of such person as either entity may designate by notice):

If to Bank:

_____
_____
_____
Attention: _____
Fax: _____

with copies to:

_____
_____
_____
_____
Fax: _____

If to Borrower:

_____
_____
_____
Attention: _____
Fax: _____

If to Guarantors:

_____

_____
_____
Fax: _____

A Notice delivered by hand shall be deemed given when actually received; a Notice delivered by registered mail, return receipt requested, shall be deemed given five (5) business days after being mailed; and a Notice delivered by overnight carrier, shipping prepaid, shall be deemed given on the business day following deposit with such carrier. Any other Notice shall be deemed given when actually received.

Either party may change its notice address by giving the other party five (5) days' written notice of such change, addressed in the manner hereinabove provided.

12. DELAY. No delay or omission of Bank to exercise any right upon the happening of any Event of Default shall impair any such right or shall be construed to be a waiver of any such default or any acquiescence therein. No waiver of any default herein shall affect any later default or impair any right of Bank. No single, partial, or full exercise of any right of Bank shall preclude other or further exercise thereof.

13. FORCE MAJEURE. For purposes of this Agreement, "force majeure" shall mean any strikes, lockouts, shortages of labor, fuel or materials, acts of God, significant adverse weather conditions not reasonably anticipated, any enemy act, riot, insurrection or other civil commotion, fire or other casualty or any other cause or circumstance beyond the reasonable control of the party.

14. SEVERABILITY. It is agreed that the rights of Bank arising hereunder shall be separate, distinct, and cumulative and none of them shall be in exclusion of the others and that no act of Bank shall be construed as an election to proceed under any one provision herein to the exclusion of any other provision, anything herein or otherwise to the contrary

notwithstanding.

15. SUCCESSORS AND ASSIGNS. The covenants, undertakings, warranties, agreements, and obligations herein contained shall bind the successors and assigns of Borrower and any holder hereof shall succeed to all the rights, powers and options herein given to Bank.

16. WAIVER. Except with respect to such time, if any, as and after Bank takes title to the Mortgaged Premises, Borrower hereby expressly relieves and discharges Bank from any and all liability and responsibility whatsoever arising out of the disbursement of Loan proceeds hereunder and expressly agrees and acknowledges that Bank does not assume any responsibility whatsoever for Borrower's method of disbursement, the application or use of Loan proceeds disbursed hereunder, or as to any liens or claims whatsoever which might attach to or be filed against the Project.

17 BANK'S LIABILITY AND RIGHTS OF THIRD PARTIES. All conditions of the obligations of Bank hereunder, including any conditions of the Bank's obligation to agree to disbursements of the Loan proceeds, are imposed solely and exclusively for the benefit of Bank and its successors and assigns and no other person shall have standing to require satisfaction of such conditions in accordance with their terms or be entitled to assume that Bank will agree to disbursements of the Loan proceeds, in the absence of strict compliance with any or all thereof, and no other person shall, under any circumstances, be deemed to be a beneficiary of such conditions, any and all of which may be freely waived in whole or in part by Bank at any time if in its sole discretion Bank deems it desirable to do so. In particular, Bank makes no representations and assumes no obligations as to Borrower or third parties concerning the quality of the construction of the Project or the absence therefrom of defects. In this connection Borrower agrees to and shall indemnify Bank from any liability, claims or losses

resulting from the disbursement of the Loan proceeds or from the condition of the Project whether related to the quality of construction or otherwise and whether arising during or after the term of the Loan. This provision shall survive the repayment of the Loan and shall continue in full force and effect so long as the possibility of any such liability, claim or loss exists.

The relationship between Bank and Borrower is solely that of a lender and borrower, and nothing contained herein or in any of the Loan Documents shall in any manner be construed as making the parties hereto principal, agent, partners, joint venturers or any other relationship other than lender and borrower.

18. BANK'S RIGHT TO ASSIGN. Bank may at any time or times sell, assign, participate, syndicate, transfer or hypothecate its interest in the Loan without the consent of Borrower, provided, however, that after such sale, assignment, participation, syndication, transfer or hypothecation, the Bank continues to administer and service all aspects of the Loan, including, without limitation, all payment requisitions. Borrower will cooperate in any such transaction and grants to the Bank the right to distribute to banks, other institutional lenders and loan participants, without further notice to the Borrower and at the Bank's sole discretion, any information relative to the construction of the Project, such as cost estimates, income pro forma and financial statements, including, without limitation, those supplied by the Borrower and the Guarantors; provided that the recipients of any such information enter into an agreement to maintain the confidentiality of such information. The Bank agrees to consult with the Borrower on the selection of any participant and hereby grants to the Borrower the right to approve such participant, such approval not to be unreasonably withheld, delayed or conditioned. The Borrower agrees to execute such

additional promissory notes and other instruments as may be appropriate or required to evidence its obligations to such syndicate or participating lenders as may commit, in the future, to fund a portion of the Loan amount in accordance with the terms hereof.

19. GOVERNING LAW. Each of the parties hereto agrees that this Agreement and all the Loan Documents were executed in Massachusetts and are governed by and construed according to the laws of The Commonwealth. Borrower hereby consents to the personal jurisdiction of The Commonwealth of Massachusetts in connection with any action arising out of or in connection with the Loan, this Agreement and/or the other Loan Documents. The Bank's obligations under this Agreement and its obligations to make any advance or to make any future commitment is subject to Statutory Loan Limitations as set forth in Mass. General Laws Chapter 167E, Section 14. Consistent with said Statutory Loan Limitations, the Bank may refuse to fund the Loan or any advance, may require a principal reduction in an existing balance, and may sell participations, in any instance where a loan limit violation could occur.

19. ENTIRE AGREEMENT. This Agreement, the Note, the Mortgage, the Leasehold Mortgage, the Assignment of Leases, the Assignment of Permits, the Guaranties, the Environmental Indemnity Agreement and any other Loan Document referred to herein or executed on or as of the date hereof integrate all of the terms and conditions with respect to the Loan and supersede all oral agreements, representations, and negotiations and prior writings with respect to the subject matter hereof.

21. MISCELLANEOUS. If any provision of this Agreement, or any term, covenant, stipulation, obligation, agreement, act, or action, or part thereof made, assumed, entered into, or taken thereunder, or any application thereof, is for any reason

held to be illegal or invalid, such illegality or invalidity shall not affect any other provision or any other term, covenant, stipulation, obligation, agreement, act, or action or part thereof, made, assumed, entered into, or taken, each of which shall be construed and enforced as if such illegal or invalid portion were not contained herein. Such illegality or invalidity of any application thereof shall not affect any legal and valid application thereof, and each such provision, term, covenant, stipulation, obligation, agreement, act, or action, or part shall be deemed to be effective, operative, made, entered into, or taken in the manner and to the full extent permitted by law.

Neither this Agreement, the other Loan Documents nor Borrower's rights thereunder shall be assigned by Borrower without the written consent of Bank.

Any consent, approval or other decision or judgment to be made by Bank under the Loan Documents may be made in the sole reasonable discretion of Bank except as otherwise specifically provided in the Loan Documents.

The headings of the sections of this Agreement are for convenience of reference only and shall not be considered a part hereof, nor shall they be deemed to limit or otherwise affect any of the terms or provisions hereof. Reference to the singular or plural shall be deemed to include the other where the context requires.

This Agreement may be executed in several counterparts, and/or by execution of counterpart signature pages which may be attached to one or more counterpart, and all so executed shall constitute one Agreement binding on all of the parties hereto, notwithstanding that all of the parties are not signatory to the original or the same counterpart. In addition, any counterpart signature page may be executed by any party wheresoever such party is located, and may be delivered by telephone facsimile transmission, and any such facsimile transmitted

signature page may be attached to one or more counterparts of this Agreement, and such faxed signature(s) shall have the same force and effect, and be as binding, as original signatures executed and delivered in person.

This Agreement may not be changed or terminated orally, but only by an agreement in writing signed by the party to be charged.

Borrower agrees to indemnify, defend, pay and hold harmless Bank and Bank's officers, directors, agents, affiliates, successors and assigns from and against any and all other liabilities, obligations, losses, damages, penalties, actions, judgments, suits, claims, costs, expenses and disbursements of any kind or nature whatsoever (including, without limitation, the fees and disbursements of counsel for any such party in connection with any investigative, administrative or judicial proceeding commenced or threatened, whether or not such party shall be designated a party thereto), that may be imposed on, incurred by, or asserted against such party in any manner relating to or arising out of any breach by Borrower of its obligations under, or any material misrepresentation by Borrower contained in, this Agreement or the other Loan Documents, including without limitation the claims of any broker claiming any compensation in connection with the Loan (collectively, the "Indemnified Liabilities"); provided, however, that Borrower shall not have any obligation to a party hereunder to the extent that such Indemnified Liabilities arise from gross negligence, illegal acts, fraud or willful misconduct of such party. To the extent that the undertaking to indemnify, pay and hold harmless set forth in the preceding sentence may be unenforceable because it violates any law or public policy, Borrower shall contribute the maximum portion that it is permitted to pay and satisfy under applicable law to the payment and satisfaction of all Indemnified Liabilities incurred by the party. Borrower

hereby acknowledges and agrees that Bank's officers, directors, agents, affiliates, successors and assigns are each an intended third-party beneficiary of this Section and that Bank has agreed to enter into this Agreement, and to perform its obligations hereunder, based on and in reliance upon this Section.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement under seal as of the date first above written.

BANK:

_____

By:_____

BORROWER:

_____,

a Massachusetts limited liability company

By: _____, its Manager

By: _____

Hereunto duly authorized

_____,

a Massachusetts limited liability company

By: _____, its Manager

By: _____

Hereunto duly authorized

GUARANTORS:

_____

a New York limited liability company

By: _____, its Operating Manager

By: _____

Hereunto duly authorized

_____

a New York limited liability company

By: _____, its Operating Manager

By: _____

Hereunto duly authorized

EXHIBIT A

List of Plans and Specifications

EXHIBIT B

Legal Descriptions

EXHIBIT C

Project Cost Analysis

EXHIBIT D

Form of Environmental Insurance Policy

ABOUT THE AUTHOR

Ben L. Fernandez

Ben Fernandez teaches Legal Drafting and Legal Research and Writing at the University of Florida Levin College of Law. He had previously taught Legal Methods, Legal Research and Objective Writing, Lawyering Process for Litigation Practice, and Transactional Drafting at Florida Coastal School of Law. Also, he worked as an adjunct professor teaching Legal Writing at Northeastern University School of Law in Boston, and Business Law at Cape Cod Community College.

Prof. Fernandez has twenty-five years of experience practicing law in Massachusetts. He represented financial institutions and government finance agencies in commercial and residential finance transactions. He had his own practice in Plymouth, Massachusetts for ten years. Before that, he practiced law in the city of Boston for fifteen years. He worked as in-house counsel for a state-sponsored affordable housing finance agency, managed the business department of a prominent minority-owned firm, and was an associate at two large Boston law firms.

Also, Prof. Fernandez served on the Board of Directors for Habitat for Humanity of Greater Plymouth, Massachusetts. He was a volunteer teacher in Junior Achievement's Financial Literacy program, and a regular speaker at Homebuyer Education Workshops sponsored by South Shore Housing and Housing Assistance Corporation on Cape Cod.

Prof. Fernandez has an LL.M. from Boston University School of Law, as well as a J.D. from Northeastern University School of Law and a B.A. from Cornell University.

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